EXHIBIT A

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 1                   IN THE UNITED STATES DISTRICT COURT

 2                     FOR THE DISTRICT OF DELAWARE

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 4     BELVAC PRODUCTION MACHINERY,    )
       INC.,                           )
 5                                     )
                      Plaintiff,       )
 6                                     ) C.A. No. 25-166-JLH
       v.                              )
 7                                     )
       ADONIS ACQUISITION HOLDINGS LLC,)
 8                                     )
                      Defendant.       )
 9

10                                      J. Caleb Boggs Courthouse
                                        844 North King Street
11                                      Wilmington, Delaware

12                                      Wednesday, April 16, 2025
                                        1:04 p.m.
13                                      Motion Hearing

14
       BEFORE:  THE HONORABLE JENNIFER L. HALL, U.S.D.C.J.
15

16     APPEARANCES:

17               CONNOLLY GALLAGHER LLP
                 BY:  ARTHUR G. CONNOLLY, III, ESQUIRE
18               BY:  ALAN R. SILVERSTEIN, ESQUIRE

19                        -and-

20               McGUIREWOODS
                 BY:  DAVID E. FINKELSON, ESQUIRE
21               BY:  KYLE S. SMITH, ESQUIRE

22                                      For the Plaintiff

23
                 RICHARDS LAYTON & FINGER, P.A.
24               BY:  KELLY E. FARNAN, ESQUIRE

25                        -and-
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 1    APPEARANCES CONTINUED:

 2              MERCHANT & GOULD P.C.
               BY:  HEATHER J. KLIEBENSTEIN, ESQUIRE
 3
                         -and-
 4

 5              PROSKAUER ROSE LLP
               BY:  DAVID A. MUNKITTRICK, ESQUIRE
 6
12:34:54                                    For the Defendant
12:34:54  7

12:35:02  8              ***  PROCEEDINGS  ***

12:35:02  9              DEPUTY CLERK:  All rise.  Court is now in

01:02:42 10    session.  The Honorable Jennifer L. Hall presiding.

01:02:42 11              THE COURT:  Okay.  Please be seated.

01:04:04 12              Okay.  We're here for a hearing today in Belvac

01:04:17 13    Production Machinery Incorporated vs. Adonis Acquisition

01:04:19 14    Holdings LLC.  It's Civil Action Number 25-166.

01:04:24 15              Let's go ahead and put our appearances on the

01:04:27 16    record, starting with Plaintiff.

01:04:29 17              MR. CONNOLLY:  Good afternoon, Your Honor.

01:04:32 18    Arthur Connolly from Connolly Gallagher.  With me today are

01:04:35 19    my partner, Alan Silverstein, from Connolly Gallagher.  And

01:04:38 20    our co-counsel David Finkelson and Kyle Smith from

01:04:38 21    McGuireWoods.

01:04:45 22              Excuse me.  Also with us today is our witness.

01:04:48 23    It's Stephen Packer.

01:04:49 24              THE COURT:  Very good.

01:04:50 25              MR. CONNOLLY:  Thank you, Your Honor.
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01:04:52 1   THE COURT: Nice to see everybody.

01:04:55 2   MS. FARNAN: Good afternoon, Your Honor. Kelly

01:04:57 3   Farnan from Richards Layton & Finger on behalf of the

01:04:59 4   Defendant, Adonis Acquisition. I have from Merchant & Gould

01:05:03 5   Heather Kliebenstein. From Proskauer, David Munkittrick.

01:05:07 6   And then we also have our CEO, John Sacksteder, in the back.

01:05:11 7   THE COURT: All right. Good to see everybody.

01:05:13 8   Okay. I can tell you that we've looked at the

01:05:18 9   briefs closely and the attachments that were provided. I

01:05:23 10   think we have a really good understanding about what

01:05:26 11   happened here and so -- but we put the time on the calendar,

01:05:35 12   so you have the time, if you need it, to make your

01:05:38 13   arguments.

01:05:38 14   Did we decide how we want to proceed? Are we

01:05:41 15   just doing the preliminary injunction hearing today or are

01:05:43 16   we also hearing argument on the motion to dismiss?

01:05:47 17   MR. FINKELSON: Your Honor, Dave Finkelson on

01:05:50 18   behalf of Belvac. I think we're doing both.

01:05:53 19   Adonis had expressed an interest in presenting

01:05:55 20   argument or limited argument on the motion to dismiss. I

01:05:58 21   think our proposal and plan was to proceed with the

01:06:02 22   preliminary injunction motion first. We do have a witness

01:06:05 23   who we intend to present testimony in support of the

01:06:07 24   preliminary injunction, Mr. Packer.

01:06:09 25   I will also follow that with argument on our

01:06:12 1 motion and then would expect counsel for Adonis to respond

01:06:15 2 to that argument, present any argument on its motion to

01:06:18 3 dismiss, which we would then rebut and or respond to in the

01:06:21 4 time allotted.

01:06:22 5   THE COURT: Any objection to proceeding that

01:06:24 6 way?

01:06:24 7   MS. KLIEBENSTEIN: Would you like me to step up

01:06:27 8 here?

01:06:27 9   THE COURT: Sure.

01:06:27 10   MS. KLIEBENSTEIN: No. No objection, Your

01:06:29 11 Honor.

01:06:29 12   My thought with the motion to dismiss is

01:06:33 13 everything that will need to be said about it will also be

01:06:36 14 said in the context of the preliminary injunction. And I

01:06:39 15 would expect to cross Mr. Packer contemporaneous with his

01:06:43 16 direct exam.

01:06:44 17   THE COURT: That's fine. All right.

01:06:46 18   MS. KLIEBENSTEIN: Thank you.

01:06:47 19   THE COURT: Let's proceed.

01:06:57 20   MR. FINKELSON: Dave Finkelson from McGuireWoods

01:06:58 21 on behalf of the Plaintiff, Belvac Production Machinery, in

01:06:59 22 support of our motion for preliminary injunction, which we'd

01:07:02 23 like to start, Your Honor, by calling Stephen Packer to the

01:07:04 24 stand to give testimony in support of the motion.

01:07:12 25   THE COURT: That's fine. Please come forward

Packer - Direct

01:07:14 1   and approach the witness stand.

01:07:23 2   Remain standing.

01:07:25 3   DEPUTY CLERK: Please remain standing and raise

01:07:31 4   your hand.

01:07:31 5   Please state and spell your name for the record.

01:07:34 6   THE WITNESS: Stephen Packer. S-T-E-P-H-E-N.

01:07:37 7   P-A-C-K-E-R.

01:07:39 8   DEPUTY CLERK: Do you swear or affirm that the

01:07:41 9   testimony you give to the Court will be the truth, the whole

01:07:43 10   truth and nothing but the truth, so help you God, or do you

01:07:46 11   so affirm?

01:07:46 12   THE WITNESS: I do so affirm.

01:07:46 13   STEPHEN PACKER, after having been duly affirmed,

01:07:48 14   testified as follows:

01:07:48 15   DEPUTY CLERK: Thank you. You may be seated.

01:07:51 16   THE COURT: Let's proceed.

01:07:53 17   MR. FINKELSON: Thank you, Your Honor.

01:07:53 18   DIRECT EXAMINATION

01:07:53 19   BY MR. FINKELSON:

01:07:53 20   Q.   Good afternoon, sir. Can you please introduce

01:07:55 21   yourself to the Court?

01:07:56 22   A.   Good afternoon. My name is Stephen Packer.

01:07:58 23   Q.   By whom are you employed, Mr. Packer?

01:08:00 24   A.   I work for Belvac Production Machinery in Lynchburg,

01:08:00 25   Virginia.

Packer - Direct

01:08:05 1   Q.   What is your title with Belvac?

01:08:06 2   A.   I'm the electrical engineering manager.

01:08:10 3   Q.   How many years have you spent at Belvac altogether,

01:08:12 4   Mr. Packer?

01:08:12 5   A.   Next month I'll be 15 years there.

01:08:17 6   Q.   What is your role as the electrical engineering

01:08:19 7   manager at Belvac?

01:08:20 8   A.   My team designs and -- the control system for our

01:08:29 9   machinery. That includes the hardware and the software in

01:08:34 10   there, and we end up working very closely with our customers

01:08:38 11   as needed. Yeah.

01:08:41 12   Q.   And when you talk about the machines at Belvac, do

01:08:45 13   those machines include can necking machines also referred to

01:08:48 14   as neckers?

01:08:49 15   A.   Yes, they do.

01:08:50 16   Q.   Do those machines also include what are known as

01:08:54 17   bodymakers?

01:08:54 18   A.   Yes.

01:08:56 19   Q.   Do you have experience specifically, Mr. Packer, with

01:08:58 20   the Belvac can making machinery, including the neckers and

01:09:02 21   bodymakers used at Adonis' facility in Salt Lake City, Utah?

01:09:07 22   A.   Yes, I do. My team and I designed those,

01:09:11 23   commissioned them at Belvac facility and then were

01:09:16 24   instrumental in the startup at the Salt Lake City facility

01:09:22 25   as well.

Packer - Direct

01:09:23 1   Q.   And are you personally knowledgeable regarding the

01:09:26 2   software that's embedded in the Belvac equipment at the

01:09:29 3   Adonis facility?

01:09:29 4   A.   Yes, I am.

01:09:31 5   Q.   How many different types of Belvac software are

01:09:34 6   deployed at the Adonis facility?

01:09:35 7   A.   There are three.

01:09:37 8   Q.   And can you explain to the Court, please, what those

01:09:40 9   three are?

01:09:40 10   A.   Yes. The necker programmable logic controller, we

01:09:45 11   usually just say PLC for short. The bodymaker, BPLC

01:09:51 12   program. And intelligent manufacturing system. Another

01:09:57 13   acronym we say, IMS. And, yes.

01:09:59 14   Q.   And what, generally, is the IMS software?

01:10:02 15   A.   The IMS software resides on an industrial PC in the

01:10:08 16   necker control panel, and it receives data from the necker

01:10:15 17   about rejected cans in a way that allows the operator or

01:10:22 18   quality control person to make quality control decisions on

01:10:25 19   the rest of the can-making line.

01:10:28 20   Q.   Now, with respect to the three categories of software

01:10:32 21   that you've described, the PLC software for the neckers, the

01:10:36 22   PLC software for the bodymakers and the IMS software, does

01:10:41 23   Belvac have copyright registrations for all of the software

01:10:44 24   in those categories as deployed at Adonis' facility?

01:10:47 25   A.   Yes, they do. In fact, I was helpful in registering

Packer - Direct

01:10:51 1   those.

01:10:53 2   Q.   At a high level, can you explain to the Court what

01:10:57 3   functions are performed by the PLC software on the neckers

01:11:01 4   at Adonis' facility?

01:11:02 5   A.   Yes. The necker PLC program controls everything.

01:11:10 6   Without that program, there would be nothing going on with

01:11:13 7   that machine. It wouldn't -- wouldn't turn a light on or it

01:11:17 8   wouldn't run a motor.

01:11:20 9   It also does rudimentary -- sorry, alarms and

01:11:27 10   messages to the operator. It works with the can lubrication

01:11:34 11   system. Controls that, controls the machine lubrication

01:11:39 12   system.

01:11:40 13   There's also some very complex sequences that it

01:11:46 14   controls such as wreckage detection. We also have a

01:11:52 15   high-speed selective sorter which is used by the quality

01:11:56 16   control team at the customer's plant to selectively sort

01:12:03 17   certain cans into a track that is then fed to a third-party

01:12:07 18   can inspection system where it measures all sorts of

01:12:11 19   physical characteristics and things of that nature.

01:12:16 20   Q.   What about the bodymakers at Adonis' facility, what

01:12:19 21   are the functions performed by the PLC software in the

01:12:23 22   bodymakers?

01:12:23 23   A.   Yeah. The bodymaker PLC software, similar to the

01:12:28 24   necker, controls the entire machine. Nothing would happen

01:12:32 25   with that machine. No functions would occur without that

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01:12:36 1   software.

01:12:38 2   Similar to the necker, again, rudimentary things

01:12:41 3   such as status, false alarms. But then there's some unique

01:12:47 4   things to the bodymaker such as short can detection. And

01:12:52 5   then it also controls a very precise trim height to the can.

01:13:01 6   Q.   Does the PLC software on the neckers and bodymakers

01:13:06 7   also perform a safety function?

01:13:07 8   A.   Yes, it does.

01:13:09 9   Q.   And can you explain how that -- how that is?

01:13:12 10   A.   Yeah. Both on the necker PLC software and the

01:13:16 11   bodymaker PLC software, they are both deeply integrated into

01:13:21 12   the control system, the safety system for each of those

01:13:25 13   machines. There are guards, switches that it is monitoring

01:13:30 14   for the doors and other access points.

01:13:33 15   And then when there's an emergency stop, then

01:13:36 16   it, again, works with the safety system to safely remove

01:13:42 17   all -- all energy and power from the machine.

01:13:46 18   Q.   Thank you, Mr. Packer.

01:13:47 19   Now, one of the issues in this case is whether,

01:13:50 20   in the course of operating the Belvac neckers and

01:13:54 21   bodymakers, Adonis will make copies of the Belvac software.

01:13:57 22   Are you prepared to speak to that issue?

01:13:58 23   A.   Yes, I am.

01:13:59 24   Q.   In the course of operating these Belvac machines, are

01:14:02 25   there scenarios in which Adonis necessarily will make copies

Packer - Direct

01:14:07 1   of the Belvac software?

01:14:08 2   A.   Yes. I can think of two.

01:14:10 3   Q.   And what are those two distinct scenarios, sir?

01:14:13 4   A.   When the PLC is rebooted, you know, powered off and

01:14:18 5   then powered back on, and then when an external device such

01:14:22 6   as a laptop is connected to the PLC.

01:14:28 7   Q.   Let's start with the power off and then power on

01:14:31 8   reboot scenario. And just to be clear when the necker --

01:14:35 9   when the -- strike that.

01:14:36 10   Just to be clear, when the Belvac necker and

01:14:38 11   bodymaker PLCs are powered on or rebooted, is a copy made of

01:14:42 12   the Belvac PLC software?

01:14:44 13   A.   Yes, it is.

01:14:47 14   Q.   And can you walk the Court through how that occurs,

01:14:49 15   please?

01:14:50 16   A.   Yes. The Belvac software is stored long term on a

01:14:58 17   secure digital card, an SD card, that's in the processor of

01:15:02 18   the PLC. When you power it up, a copy of that program is

01:15:09 19   then copied over to the nonvolatile -- excuse me, the

01:15:13 20   volatile ram, random access memory of the PLC.

01:15:18 21   Q.   And does that process happen each time the PLC is

01:15:21 22   powered on and rebooted?

01:15:23 23   A.   Every time.

01:15:24 24   Q.   Okay. And does that copy that is created, upon power

01:15:27 25   on or reboot, remain in the ram of the PLC? And if so,

Packer - Direct

01:15:32 1 until when?

01:15:32 2 A.   It does remain in the ram until the power is turned

01:15:36 3 off of the PLC.

01:15:37 4 Q.   And do you know all of this from your personal

01:15:40 5 experience working with the Belvac necker and bodymaker

01:15:43 6 PLCs?

01:15:43 7 A.   Yes, I am. Yes, I do.

01:15:45 8 Q.   Did you confirm that personal knowledge in any other

01:15:47 9 sources?

01:15:48 10 A.   Yes, confirmed it with a -- a user manual for the PLC

01:15:54 11 from Rockwell. And that Rockwell is the brand of

01:15:59 12 programmable logic controllers that are used on the

01:16:03 13 bodymakers and the neckers.

01:16:08 14   MR. FINKELSON: Your Honor, I'm going to share

01:16:10 15 an exhibit on the screen with the witness. May I approach

01:16:12 16 to give the Court some copies?

01:16:14 17   THE COURT: Yes. Yes.

01:16:14 18 BY MR. FINKELSON:

01:16:31 19 Q.   I've put up on the screen, Mr. Packer, a document

01:16:34 20 that appears in Exhibit 1 to a declaration that you

01:16:37 21 submitted in this case in support of the preliminary

01:16:40 22 injunction motion.

01:16:40 23   Can you just identify, please, for the Court

01:16:43 24 what we're looking at here?

01:16:46 25 A.   Yes. This is the document that I declared and it is

Packer - Direct

01:16:51 1   the user manual -- programming manual for the nonvolatile

01:16:58 2   memory card for the Rockwell Programmable Logic Controllers.

01:17:02 3   MR. FINKELSON: And, Your Honor, I believe this

01:17:03 4   is already in evidence for purposes of the motion by virtue

01:17:05 5   of the papers. But to the extent I need to move it into

01:17:09 6   evidence, I do now do so.

01:17:10 7   THE COURT: Any objection?

01:17:12 8   MS. KLIEBENSTEIN: No, Your Honor.

01:17:14 9   THE COURT: All right. The document handed up

01:17:15 10   to the Court marked as Appendix 1 is admitted into evidence.

01:17:19 11   (Appendix No. 1 was admitted into evidence.)

01:17:21 12   MR. FINKELSON: Mr. Smith, can you please turn

01:17:22 13   us to Page 9?

01:17:22 14   BY MR. FINKELSON:

01:17:25 15   Q.   We're looking now at Page 9 of Appendix 1.

01:17:29 16   Can you explain to the Court, please,

01:17:31 17   Mr. Packer, how what appears here on Page 9 confirms your

01:17:35 18   testimony regarding reproduction upon a power on or reboot?

01:17:38 19   A.   Yeah. The middle section there, which is highlighted

01:17:42 20   now, the last sentence, "When this occurs, you can load the

01:17:48 21   copy from the memory card to the user memory of the

01:17:51 22   controller: Whenever it powers up."

01:17:54 23   Q.   And that's consistent with your personal experience

01:17:57 24   dealing with these -- with this PLC software, that you have

01:18:01 25   an automatic copying of the software upon a reboot; is that

Packer - Direct

01:18:06 1 right, sir?

01:18:06 2 A.   That is correct.

01:18:08 3 Q.   What would be some of the reasons --

01:18:09 4   MR. FINKELSON: You can take that down,

01:18:12 5 Mr. Smith. Thank you.

01:18:12 6 BY MR. FINKELSON:

01:18:13 7 Q.   What would be some of the reasons, Mr. Packer, like

01:18:15 8 that a customer like Adonis would reboot the necker and

01:18:18 9 bodymaker PLCs?

01:18:19 10 A.   I can think of four different reasons.

01:18:21 11 Q.   And can you explain what those are, please, sir?

01:18:23 12 A.   Yes. Just the normal maintenance, certain --

01:18:31 13 performing certain maintenance tasks and repairs would

01:18:35 14 require turning off power to the whole control panel, which

01:18:39 15 would then, of course, power off the PLC. And I'm just

01:18:44 16 talking about things that happen all the time.

01:18:48 17   Like if I was to work on our washer in our

01:18:52 18 basement, the clothes washer, I would -- first thing, I

01:18:55 19 would unplug this. Unplug the washer before I tore it

01:19:00 20 apart.

01:19:01 21   Similar to this, when anyone is working in the

01:19:05 22 necker for extended periods of time, you need to power off.

01:19:10 23 And these certain maintenance tasks could be replacing a

01:19:19 24 bearing, or a bushing or even exchanging the tooling which

01:19:23 25 are used in the necker to shape the top of the can.

Packer - Direct

01:19:29 1   Q.   That's one category.

01:19:30 2   What's the second instance --

01:19:32 3   A.   Yes.

01:19:32 4   Q.   -- in which a customer like Adonis would reboot the

01:19:35 5   necker and bodymaker PLCs?

01:19:37 6   A.   They would need to turn off the logic control panel.

01:19:41 7   Again, turning off the PLC if a device -- electronic device

01:19:45 8   in the control panel failed and needed to be replaced.

01:19:50 9   Q.   Okay.

01:19:52 10   Moving to a third category. What about hardware

01:19:54 11   changes or modifications?

01:19:56 12   A.   Exactly. Third would be the modifications such as

01:20:00 13   adding anything to the necker or taking some modules off of

01:20:05 14   our necker would require that.

01:20:07 15   And then the fourth one, if I may, would just be

01:20:10 16   any power outage that might occur from weather or any other

01:20:17 17   event that turns power off in the plant.

01:20:20 18   Q.   How frequently do at least one of these things

01:20:23 19   generally occur necessitating a reboot, in your experience?

01:20:26 20   A.   The -- the first one for sure all the time. Very

01:20:30 21   frequently. Multiple times a month, if not -- yeah, many

01:20:36 22   times.

01:20:37 23   Q.   Okay. Have you reviewed the declaration submitted in

01:20:41 24   this case by Jerry Gilbert of Adonis?

01:20:44 25   A.   Yes, I have.

Packer - Direct

01:20:45 1   Q.   And do you recall Mr. Gilbert's statement that Adonis

01:20:49 2   has not yet powered off and rebooted the PLCs in the short

01:20:53 3   time since Adonis --

01:20:55 4   MR. FINKELSON: Bless you, Your Honor.

01:20:55 5   THE COURT: Thank you.

01:20:55 6   BY MR. FINKELSON:

01:20:57 7   Q.   Do you recall Mr. Gilbert's statement that Adonis has

01:20:59 8   not yet powered off or rebooted the PLCs in the short time

01:21:03 9   since Adonis took ownership of the Belvac machinery?

01:21:06 10   A.   I have read that. Yes, sir.

01:21:07 11   Q.   And what do you make of that, sir?

01:21:08 12   A.   If they haven't already, they will. It is imminent

01:21:12 13   and unavoidable.

01:21:14 14   Q.   Let's move from the power on reboot category to the

01:21:17 15   second category of copying that you identified with respect

01:21:22 16   to external device access. Can you first explain why a

01:21:28 17   customer like Adonis would access the Belvac necker and

01:21:32 18   bodymaker PLC software from an external device?

01:21:36 19   A.   Yes. Any time they need to review the PLC program,

01:21:44 20   troubleshoot the PLC program, you know, for whatever reason,

01:21:47 21   the necker has stopped and it's not obvious from the

01:21:51 22   messages on the screen why it stopped and how to resolve it,

01:21:55 23   they would need to go online with the PLC using an external

01:22:00 24   device such as a laptop.

01:22:03 25   And then the last one would be to make changes

Packer - Direct

01:22:06 1   to the program, and they would be making changes. It's not

01:22:10 2   infrequent. You know, the needs of the can plant are going

01:22:13 3   to change, and so they want to be able to change the PLC

01:22:19 4   program as needed.

01:22:21 5   Q.   Do you recall Mr. Gilbert's own testimony in his

01:22:23 6   declaration about another circumstance in which access to

01:22:27 7   the PLC code would be needed?

01:22:30 8   A.   Yes. Mr. Gilbert declared that there are technicians

01:22:36 9   that need to change certain operating parameters, and he

01:22:40 10   mentioned speed, I believe.

01:22:44 11   Q.   The situation where a copy is created using external

01:22:47 12   device access, how would you describe the frequency with

01:22:51 13   which that occurs?

01:22:52 14   A.   It will be happening very frequently. Yeah, almost

01:23:01 15   all the time. Yeah.

01:23:03 16   Q.   Do Adonis personnel have the ability to access the

01:23:06 17   PLC software from an external device?

01:23:09 18   A.   According to Mr. Gilbert's declaration, they own two

01:23:16 19   copies of Rockwell Automation Studio 5000 Application on two

01:23:22 20   different laptops.

01:23:24 21   Q.   Along with the license and access rights that come

01:23:27 22   with that; is that right?

01:23:28 23   A.   That come with the Rockwell software, yes.

01:23:31 24   Q.   And the ability of those Adonis personnel to access

01:23:35 25   the PLC software, does that include an ability to access the

Packer - Direct

01:23:41 1   safety system aspects of the Belvac software?

01:23:43 2   A.   Yes, they can access all parts, including the safety

01:23:47 3   aspects.

01:23:47 4   Q.   Is any different password required to do that?

01:23:50 5   A.   There are no passwords.

01:23:52 6   Q.   And similarly to what we talked about on the -- of

01:23:54 7   the power on reboots, do you understand that Mr. Gilbert has

01:23:58 8   stated by declaration that Adonis has not yet accessed the

01:24:01 9   PLC software from an external device since the purchase?

01:24:04 10   A.   Yes. I read that in his declaration.

01:24:06 11   Q.   And what's your view of that with respect to external

01:24:09 12   device access?

01:24:10 13   A.   It's going to happen. It is imminent. And, yeah, to

01:24:15 14   continue to make cans in a most efficient way and respond

01:24:21 15   to -- the most to the changes that the plant requires,

01:24:25 16   they're going to need to access, you know, the PLC program

01:24:29 17   with a laptop or other device.

01:24:31 18   Q.   And just so the record's clear, when the Belvac

01:24:34 19   necker and bodymaker PLC software is accessed from an

01:24:38 20   external device such as a laptop for any purpose, is a copy

01:24:42 21   made of the Belvac software?

01:24:43 22   A.   Yes, it is.

01:24:49 23   Q.   Can you explain each of the different ways that a

01:24:52 24   copy of the Belvac PLC software is created in the external

01:24:56 25   device access scenario?

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01:24:58 1   A.   I can think of two ways. The first is if there's not

01:25:04 2   a copy already of the Belvac software on the laptop, in that

01:25:12 3   instance, a technician or an electrician would go to the

01:25:15 4   necker or bodymaker PLC with that laptop and run -- running

01:25:22 5   Rockwell Automation Studio 5000 application, they would

01:25:26 6   upload the program from the PLC onto the laptop's hard drive

01:25:34 7   long-term storage; and therefore, a copy would be made.

01:25:37 8   Q.   And what's the second alternative scenario?

01:25:40 9   A.   Second alternative would be if they already have a

01:25:44 10   copy on the laptop, a copy of the Belvac software, then they

01:25:51 11   would just -- whenever they open up the program using

01:25:58 12   Rockwell's software, a copy would be made from the laptop's

01:26:03 13   hard drive into the laptop's ram.

01:26:07 14   Q.   So as to the first example you provided for, how long

01:26:10 15   does the local copy of the software remain in the external

01:26:14 16   device's nonvolatile memory?

01:26:17 17   A.   Until the technician would delete it.

01:26:21 18   Q.   Okay. And as to the second example that you provided

01:26:23 19   for, how long does the copy of the software remain in the

01:26:27 20   external device's ram?

01:26:29 21   A.   Until the technician or electrician closes that

01:26:34 22   program.

01:26:34 23   Q.   Okay. Let me change gears and talk about the necker

01:26:39 24   parts.

01:26:40 25   First, has Belvac recently delivered certain

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01:26:42 1   can-making parts to Adonis?

01:26:44 2   A.   Yes, they have.

01:26:45 3   Q.   And do you refer to those in your declarations as the

01:26:48 4   necker parts?

01:26:49 5   A.   Yes.

01:26:50 6   Q.   What more specifically are the necker parts?

01:26:52 7   A.   These are five necking modules and an intermediate

01:26:58 8   in-feed module. So our neckers -- in particular, our

01:27:03 9   modular -- kind of think of it as a train, you know, with

01:27:09 10   box cars. So if you want to neck the top of the can down a

01:27:14 11   lot, you would just have more modules. Okay. Different

01:27:18 12   size tooling in each one.

01:27:20 13   So these five necking modules and this

01:27:26 14   intermediate in-feed module are going to be inserted into

01:27:29 15   the middle of this necker on Line 1.

01:27:34 16   Q.   Let me ask you this: Do the necker parts themselves

01:27:37 17   have any software?

01:27:38 18   A.   No, they do not.

01:27:40 19   Q.   So, based on your knowledge and experience with those

01:27:43 20   necker parts and with the equipment that's already at the

01:27:46 21   Adonis facility, what does Adonis need to do to put those

01:27:50 22   parts in operation?

01:27:51 23   A.   Need to do a lot of things, but two are relevant

01:27:55 24   here. They need to be -- power off the control panel;

01:28:00 25   therefore, the PLC, and they need to modify the software.

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01:28:06 1   Q.   Okay. Let's talk about each of those.

01:28:08 2   Why is that power off and then rebooting

01:28:12 3   necessary in order for Adonis to put the necker parts into

01:28:17 4   operation?

01:28:17 5   A.   Again, as I mentioned, you know, we're splitting --

01:28:20 6   they are going to be splitting apart the necker. And, yeah,

01:28:25 7   OSHA would require -- does require that they power off. The

01:28:30 8   machine is powered by, you know, 480 volts AC. Just like I

01:28:36 9   would turn off my washer machine if I was working on that.

01:28:40 10   And this is much more than just a simple repair.

01:28:42 11   This is tearing -- taking the machine completely apart. So,

01:28:46 12   yes, they would turn off the power and lock out the control

01:28:52 13   panel.

01:28:53 14   Q.   And just to give the Court a sense of the size and

01:28:56 15   scope of the machinery we're talking about, can you --

01:28:59 16   A.   Yeah.

01:29:00 17   Q.   -- describe that please?

01:29:01 18   A.   Yeah, from my seat to that exit sign.

01:29:04 19   Q.   And how heavy is this equipment?

01:29:06 20   A.   Oh, tons. Each module, you need to use a forklift to

01:29:09 21   move.

01:29:10 22   Q.   All right. What about the external device access

01:29:14 23   that you mentioned to modify the PLC software to accommodate

01:29:18 24   the necker parts, why is that necessary?

01:29:20 25   A.   Without that, the PLC program will not recognize the

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01:29:27 1 new parts. They're getting a new motor and a new varile

01:29:34 2 speed drive that controls the motor. And without

01:29:37 3 programming changes, it won't -- the program will not

01:29:41 4 recognize the new VFD, varile frequency drive. It won't

01:29:46 5 recognize any of the sensors.

01:29:49 6   Yeah. Nothing would work on the intermediate

01:29:53 7 in-feed. It won't be lubricating cans on that intermediate

01:29:57 8 in-feed and on and on.

01:30:00 9 Q.   Will each of these steps that you've talked about

01:30:02 10 with the necker parts, the powering off and back on of the

01:30:07 11 PLC and the access and modification of the necker PLC

01:30:12 12 software, result in copies being made of the Belvac

01:30:15 13 software?

01:30:15 14 A.   Yes.

01:30:16 15 Q.   And is that for all the reasons you described earlier

01:30:18 16 in the context of the reboot process and the external device

01:30:23 17 access?

01:30:23 18 A.   Yes, sir. Exactly.

01:30:25 19 Q.   Let me move to a final topic. You've testified in

01:30:27 20 your declaration about the issue of irreparable harm; is

01:30:31 21 that right?

01:30:31 22 A.   Yes, I have.

01:30:34 23 Q.   As a layperson, Mr. Packer, what do you understand

01:30:37 24 irreparable harm to mean?

01:30:38 25 A.   Damage to our reputation and goodwill in the

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01:30:44 1   industry. And when you do that, you can't put an estimate

01:30:48 2   on the -- on the dollar amount of that.

01:30:52 3   Q.   If Adonis is permitted to use and reproduce the

01:30:55 4   Belvac software, will Belvac suffer harm that it can't

01:30:58 5   quantify in dollars?

01:30:59 6   A.   Yes, it will.

01:31:01 7   Q.   And are there specific examples of why Belvac

01:31:05 8   believes that to be the case?

01:31:06 9   A.   I could think of three. Irreparable harm to our

01:31:11 10   reputation and goodwill in the industry in regards to

01:31:16 11   safety.

01:31:18 12   Same thing. Irreparable harm to our good name

01:31:23 13   and reputation with regard to quality. And also just loss

01:31:28 14   of control of our intellectual property.

01:31:32 15   Q.   Let's talk about each of those briefly, and let's

01:31:34 16   start with safety.

01:31:36 17   First, what steps does Belvac take to ensure the

01:31:40 18   safe operation of its neckers and bodymakers?

01:31:42 19   A.   Okay. While we're designing the neckers and

01:31:46 20   bodymakers, we're working -- my team, it is working very

01:31:50 21   closely with mechanical engineers, and we come up with a

01:31:55 22   risk assessment. And so based on the risk assessment, we

01:31:59 23   put up guarding and then determine what kind of sensors to

01:32:05 24   be used for those guards. How many E-stop push buttons, how

01:32:10 25   to remove power safely on an emergency stop, all those

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01:32:14 1   things are considered.

01:32:15 2   So when we are building and we have -- when we

01:32:19 3   have built, and assembled and tested each of the neckers and

01:32:25 4   bodymakers in our Lynchburg facility, the last step that we

01:32:29 5   do before we start tearing it up so we can ship it is to do

01:32:34 6   a complete safety validation and verification based on

01:32:38 7   that -- that risk assessment.

01:32:40 8   Q.   And you used the word "E-stop." What does the E

01:32:43 9   refer to?

01:32:43 10   A.   I'm sorry. Emergency stop.

01:32:45 11   Q.   Okay. So you talked about the safety certification

01:32:48 12   that is done at the Lynchburg facility.

01:32:51 13   How about upon installation of --

01:32:53 14   A.   Yes.

01:32:53 15   Q.   -- the neckers and bodymakers?

01:32:55 16   A.   Our service personnel, once they're done, they verify

01:33:01 17   that the safety system is working as required as well.

01:33:05 18   Q.   How about post-installation?

01:33:07 19   A.   Our service personnel are constantly rotating in and

01:33:13 20   out of our customers' can plants. They're in there for all

01:33:18 21   sorts of reasons, for training, for helping with

01:33:24 22   maintenance, for doing some upgrades as we've discussed.

01:33:29 23   So when they see the machine behaving in a way

01:33:33 24   that they know shouldn't or just are questioning it, they

01:33:37 25   will contact my team or the electrical engineers and then we

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01:33:41 1   will work with the customer to make any changes as required.

01:33:44 2   Q.   And those customers that you referred to, are they

01:33:46 3   all licensees of the Belvac software?

01:33:49 4   A.   Yes, they are.

01:33:50 5   Q.   To your understanding, is Adonis a licensee of the

01:33:54 6   Belvac software?

01:33:55 7   A.   My understanding -- sorry. My understanding is, no,

01:33:57 8   they're not.

01:34:03 9   MR. FINKELSON: Your Honor, there's one other

01:34:05 10   document that I would like to share with the witness. May I

01:34:07 11   approach with copies?

01:34:09 12   THE COURT: Yes.

01:34:11 13   MR. FINKELSON: I don't need to move this into

01:34:26 14   evidence, Your Honor, but for the record, this is one of

01:34:28 15   Mr. Gilbert's declarations that he submitted in conjunction

01:34:32 16   with the preliminary injunction briefing.

01:34:39 17   Mr. Smith, can you take us to Paragraph 8,

01:34:42 18   please, of this March 17th, 2025 declaration and highlight

01:34:47 19   the third sentence?

01:34:47 20   BY MR. FINKELSON:

01:34:49 21   Q.   Do you see here, Mr. Packer, Mr. Gilbert's testimony

01:34:53 22   that the Belvac safety code software ensures that critical

01:34:59 23   safety components of the equipment are operational?

01:35:03 24   A.   I couldn't agree with him more. I wholeheartedly

01:35:07 25   agree with that.

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01:35:08 1   Q.   Let's look at another statement in this Paragraph 8

01:35:13 2   that --

01:35:14 3   MR. FINKELSON: If you could highlight the first

01:35:15 4   sentence, please, Mr. Smith. The very first one.

01:35:15 5   BY MR. FINKELSON:

01:35:27 6   Q.   You see where it says, "The software includes safety

01:35:31 7   code that neither I nor other personnel at Adonis are able

01:35:35 8   to modify"?

01:35:36 9   A.   I do. I have read that.

01:35:38 10   Q.   And later on, a few sentences down, it notes that,

01:35:42 11   according to Mr. Gilbert, "Adonis is unable to modify the

01:35:46 12   safety code."

01:35:47 13   Do you see that?

01:35:47 14   A.   Yes, I do.

01:35:48 15   Q.   Is Mr. Gilbert correct about those statements?

01:35:51 16   A.   He is not correct. Those -- those are -- he is

01:35:54 17   misunderstood. He misunderstands.

01:35:56 18   Q.   And what is -- what are the accurate facts with

01:36:00 19   respect to Adonis' personnel's ability to access the safety

01:36:04 20   code in the Belvac software?

01:36:05 21   A.   Yeah. Belvac does not password protect any parts of

01:36:10 22   the Belvac software. Mr. Gilbert has already declared that

01:36:18 23   Adonis has two copies of the Rockwell software necessary to

01:36:22 24   make changes on those laptops; and, therefore, they are able

01:36:28 25   to modify not only the -- well, they're able to modify the

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01:36:33 1   safety answer of the PLC program.

01:36:36 2   Q.   Thank you, Mr. Packer.

01:36:37 3   This may be an obvious question, but what are

01:36:40 4   the potential safety consequences if Belvac loses its

01:36:44 5   ability to control the software embedded in the machines at

01:36:49 6   Adonis, including the safety software?

01:36:51 7   A.   Oh, God forbid anyone gets hurt or even killed in

01:36:56 8   these machines. They are dangerous equipment going at high

01:36:59 9   speeds. The top speed for the necker is 3,000 cans per

01:37:03 10   minute. It is a fast-moving machine.

01:37:07 11   If there were changes made that are outside of

01:37:12 12   Belvac's control that negatively affect the safe operation

01:37:15 13   of the machine and someone gets hurt, Belvac's reputation

01:37:21 14   and goodwill in the industry would be irreparably harmed.

01:37:26 15   The canning industry is a very close-knit

01:37:30 16   industry. I almost guarantee that, you know, all -- most of

01:37:34 17   the big players in the can industry know that there are

01:37:38 18   Belvac bodymakers and neckers at the Adonis facility.

01:37:44 19   Q.   All right. Let's move from the safety-related issues

01:37:46 20   to the quality-related harm that you identified.

01:37:49 21   Can you elaborate on that?

01:37:50 22   A.   Well, similar to the safety, if there are changes

01:37:56 23   made to the Belvac software on the bodymaker or the necker

01:38:02 24   that Belvac is not in control of, or, you know, monitoring

01:38:06 25   through our service personnel's witnessing of the machine

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01:38:12 1   function, the can quality can certainly degrade. And

01:38:18 2   there -- in addition to that, you know, the throughput of

01:38:23 3   the machine might be negatively affected which would, again,

01:38:28 4   get out in the industry, and Belvac would -- would be

01:38:35 5   irreparably harmed to that. Our good name would be

01:38:38 6   tarnished because of that.

01:38:39 7   Q.   How would those can quality issues or delays flow

01:38:42 8   downstream to customers?

01:38:44 9   A.   Well, they could have defects that cause leaks in the

01:38:50 10   cans. They could have all sorts of issues such as that, or

01:38:53 11   just not getting the quantity of cans they need in a timely

01:38:57 12   manner.

01:38:57 13   Q.   And would that adversely affect Belvac's reputation?

01:39:00 14   A.   It would definitely get out that those cans are not

01:39:03 15   or those machines, excuse me, are not performing as

01:39:07 16   expected. And it would -- it would tarnish our reputation.

01:39:09 17   Q.   And, lastly, can you speak further to the harm that

01:39:12 18   would result from Belvac losing control over its

01:39:17 19   intellectual property?

01:39:20 20   A.   This one hurts me the most almost because I've

01:39:23 21   already put 15 years developing the software. Countless

01:39:28 22   hours, man-hours, not only of my time, but other engineers.

01:39:32 23   We've spent, you know, all sorts of money developing this

01:39:36 24   software. We've developed -- we've built prototypes. We've

01:39:41 25   had all sorts of investments to get to the point where our

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01:39:45 1   software is what it is today. And to have no control over

01:39:51 2   that software and it to be used in an unlicensed manner

01:39:56 3   would irreparably harm Belvac.

01:39:58 4   Q.   Would it deprive Belvac of a competitive advantage

01:40:02 5   that it otherwise has --

01:40:03 6   A.   Oh, sure.

01:40:03 7   Q.   That it otherwise has in the marketplace?

01:40:06 8   A.   My apologies. Yes, it would. I -- I am very proud

01:40:11 9   of the competitive advantages that we have built into the

01:40:14 10 software that no other customer -- no other competitor has.

01:40:20 11   MR. FINKELSON: Thank you, Mr. Packer.

01:40:21 12   Your Honor, I'll pass the witness, subject to

01:40:25 13 the right to redirect, if necessary.

01:40:27 14   THE COURT: Thank you.

01:40:27 15   CROSS-EXAMINATION

01:40:27 16 BY MS. KLIEBENSTEIN:

01:40:50 17 Q.   Let me get situated. It goes quicker when I'm

01:40:54 18 organized.

01:40:57 19   All right. Good afternoon, Mr. Packer.

01:41:14 20 A.   Good afternoon.

01:41:15 21 Q.   My name is Heather Kliebenstein and I represent the

01:41:19 22 Defendants in this matter. And I'll be asking you a few

01:41:21 23 questions about your testimony.

01:41:23 24   I will try not to repeat what's in the

01:41:27 25 declarations so as to be efficient. Working from the end to

01:41:36 1   the front of your testimony, you were just talking about the

01:41:41 2   safety features in the Belvac code.

01:41:43 3   Do you recall that testimony?

01:41:44 4   A.   Yes, ma'am.

01:41:45 5   Q.   And we looked at a declaration from Mr. Gilbert who

01:41:51 6   is from Adonis and it -- you know, from my perspective, it

01:41:56 7   appears like the parties agree that the safety code is

01:41:59 8   important.

01:41:59 9   Would you agree with that?

01:42:00 10   A.   Very much so.

01:42:01 11   Q.   And Vobev, now Adonis, they've been in the canning

01:42:07 12   industry for several years; correct?

01:42:08 13   A.   Yes.

01:42:09 14   Q.   So they're not, you know, brand new setting up the

01:42:12 15   very first factory. They've been running it for several

01:42:15 16   years. They know how to work with the equipment; correct?

01:42:17 17   A.   Belvac has been there training them for quite a

01:42:21 18   while, yes.

01:42:23 19   Q.   Understood. But the point remains that Vobev, now

01:42:31 20   Adonis, isn't a brand new kid on the block, if you will?

01:42:37 21   A.   Okay. I accept that.

01:42:43 22   Q.   And I recall another declaration that you signed that

01:42:48 23   stated "Belvac locks the safety logic and creates a unique

01:42:55 24   safety signature."

01:42:56 25   A.   Yes.

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01:42:56 1   Q.   Do you recall that?

01:42:58 2   A.   Yes.

01:42:59 3   Q.   It's not just out there in the open. Things have to

01:43:02 4   be done to get into the safety code; right?

01:43:03 5   A.   That's correct. And I'd like to elaborate, if I may.

01:43:09 6   Q.   I appreciate that. Your counsel can ask you that

01:43:13 7   question.

01:43:13 8   A.   Very good.

01:43:20 9   Q.   I note in your testimony that you didn't mention the

01:43:24 10   April 7th date in your final declaration in this matter.

01:43:26 11   You stated that Adonis would be installing the new necker

01:43:31 12   equipment on April 7th.

01:43:32 13   Do you recall that?

01:43:33 14   A.   I think it needed to ship from our facility by that

01:43:37 15   date, and I believe it did. But I'm not in control of that.

01:43:41 16   Q.   So you don't know if Adonis has received the

01:43:43 17   equipment?

01:43:44 18   A.   I know that they have, yes. I heard -- I have heard

01:43:47 19   feedback that they have received it.

01:43:48 20   Q.   Okay. And the necker equipment that we're talking

01:43:55 21   about, remind me, where are the facilities from which

01:44:01 22   equipment ships for Belvac?

01:44:03 23   A.   Our Lynchburg facility. Lynchburg, Virginia.

01:44:07 24   Q.   Any others?

01:44:08 25   A.   For -- for these machines, no.

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01:44:11 1   Q.   Are you sure about that?

01:44:11 2   A.   We have shipped decorators from other places and

01:44:17 3   we've shipped -- but for the Belvac equipment that we're

01:44:22 4   talking about --

01:44:22 5   Q.   Mm-hmm.

01:44:23 6   A.   -- the bodymakers and the neckers, they're coming

01:44:26 7   from Lynchburg.

01:44:27 8   Q.   Is there a facility in Belgium?

01:44:28 9   A.   The Netherlands, not Belgium.

01:44:32 10   Q.   Apologies. The Netherlands?

01:44:34 11   A.   Almost got me.

01:44:36 12   Q.   There's a facility in the Netherlands; correct?

01:44:38 13   A.   They make decorators. Yes.

01:44:40 14   Q.   And would it surprise you if some of the equipment

01:44:42 15   was coming from the Netherlands?

01:44:44 16   A.   The necker equipment that we're talking about, the

01:44:48 17   five neck and intermediate in-feed?

01:44:52 18   Q.   The equipment that Adonis is receiving pursuant to

01:44:58 19   the Critical Vendor Agreement.

01:44:59 20   A.   I don't have any knowledge of the Critical Vendor

01:45:03 21   Agreement.

01:45:03 22   Q.   Okay. So you're not sure about all the equipment

01:45:05 23   that was ordered and is being delivered?

01:45:07 24   A.   That's correct. I'm only aware of the five necking

01:45:10 25   module and the intermediate in-feed per line, one necker.

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01:45:13 1   Q.   And as to the install date, have you been advised

01:45:16 2   that Adonis has told personnel at Belvac that the install

01:45:23 3   project is on hold, that it's not -- there's no plan for it

01:45:26 4   at the moment?

01:45:28 5   A.   I think I had heard that, yes.

01:45:29 6   Q.   You've heard that?

01:45:31 7   And what exactly have you heard relating to that

01:45:34 8   topic?

01:45:34 9   A.   Only that it's on hold.

01:45:38 10   Q.   And so that part of your declaration that the install

01:45:40 11   was going to happen on April 7th is not correct?

01:45:43 12   A.   I believe I stated that it needed to be shipped from

01:45:47 13   our Lynchburg facility by April 7th.

01:45:58 14   Q.   You mentioned that the equipment, the new equipment,

01:46:04 15   does not have any software on it; is that right?

01:46:06 16   A.   That is correct.

01:46:07 17   Q.   And why not?

01:46:08 18   A.   It's just hardware. There's no processor shipping

01:46:17 19   with those parts.

01:46:19 20   Q.   Okay. Let's back up and talk about the software that

01:46:49 21   runs the neckers and the software that runs the bodymakers

01:46:53 22   where you started your testimony.

01:46:54 23   A.   Okay.

01:46:55 24   Q.   And I recall that you talked a lot about the various

01:46:58 25   functions that the software performs for the neckers and the

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01:47:01 1   bodymakers. Am I characterizing that correctly?

01:47:03 2   A.   Yes.

01:47:04 3   Q.   Would you characterize the software as functional?

01:47:07 4   A.   Yes.

01:47:17 5   Q.   And the functions that you listed, those are -- would

01:47:24 6   you call those essential functions to run the equipment?

01:47:27 7   A.   Yes, lubrication and alarms and -- yes.

01:47:39 8   Q.   Do you know -- moving into the relationship with

01:47:42 9   Vobev over the years. You testified earlier that you've

01:47:47 10   worked with Vobev; correct?

01:47:49 11   A.   Yes. I've traveled at least twice there.

01:47:51 12   Q.   At least twice. The last time you were boots on the

01:47:54 13   ground was September 2022?

01:47:55 14   A.   Me personally, but I think there's been other Belvac

01:47:58 15   people there since then.

01:47:59 16   Q.   You personally. So two-and-a-half years ago, you

01:48:03 17   personally; correct?

01:48:03 18   A.   Yes. Yes, ma'am.

01:48:04 19   Q.   And what type of work did you do at the two visits?

01:48:07 20   A.   The first was the initial installation of the first

01:48:13 21   machine. I was helping with that. High visibility and we

01:48:17 22   wanted to make sure an electrical engineer was there.

01:48:19 23   The second, I believe, was for integration of a

01:48:24 24   custom software in the PLC for the necker line, one where it

01:48:30 25   would send data to a third-party can inspection machine. So

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01:48:37 1   that was custom software that we were installing for them.

01:48:41 2   Q.   Are you aware of how much Vobev has paid Belvac over

01:48:45 3   the years for the equipment?

01:48:46 4   A.   No, I'm not.

01:48:48 5   Q.   Would it surprise you if it was over $60 million?

01:48:51 6   A.   No, it wouldn't.

01:48:54 7   Q.   And with regard to services, would you -- would

01:48:59 8   you -- Belvac offers customization services for the

01:49:05 9   software; correct?

01:49:06 10   A.   Yes. We just talked about one. Yes.

01:49:10 11   Q.   Yes. Yes.

01:49:11 12   And so that's to get the machines up and running

01:49:14 13   at the specification that a particular customer needs;

01:49:17 14   right?

01:49:17 15   A.   Mm-hmm. Yes.

01:49:18 16   Q.   Would it surprise you that -- well, how are those

01:49:23 17   services charged and paid for with Belvac? Is that hourly

01:49:27 18   or is it different?

01:49:28 19   A.   For installation?

01:49:32 20   Q.   For installation. Let's take it one by one.

01:49:35 21   A.   Yeah. I believe -- I'm not involved in it, so I'm --

01:49:41 22   you know, I'm not a good expert on this part of it, but our

01:49:45 23   service coordinator would provide an estimate to the

01:49:50 24   customer plant based on specifics of the machine that

01:49:52 25   they're installing. How many man-hours it would take to do

Packer - Cross

01:49:56 1   that, and then time and materials. Yeah.

01:50:01 2   Q.   Would it surprise you if Vobev had paid Belvac over

01:50:05 3   10 million for services over the years?

01:50:07 4   A.   No, it wouldn't. From what I've heard, we've had

01:50:10 5   thousands of hours of training and retraining and, yeah, a

01:50:17 6   lot of time there.

01:50:18 7   Q.   And customization; correct?

01:50:20 8   A.   And customization; that's correct.

01:50:32 9   Q.   Would you agree that if the Belvac software was

01:50:36 10   removed today from the neckers and the bodymakers that they

01:50:41 11   would cease to function; correct?

01:50:43 12   A.   Yes, that's what I've just testified.

01:51:05 13   Q.   Let's talk about computing for a minute, if we can.

01:51:12 14   So you testified earlier that it's your understanding --

01:51:14 15   it's your belief that when the machines are booted on and

01:51:18 16   off, the PLC is booted on or off that the SD card, the

01:51:25 17   nonvolatile memory, whether it's flash or SD card, that

01:51:28 18   makes a copy of the software and puts it into ram; correct?

01:51:31 19   A.   Yes, ma'am. Yes.

01:51:31 20   Q.   That's a very traditional computing structure; isn't

01:51:34 21   that right?

01:51:35 22   A.   Yeah.

01:51:36 23   Q.   And that's because the SD card, that's what stores

01:51:42 24   software?

01:51:42 25   A.   That is correct.

Packer - Redirect

01:51:43 1 Q.   And the ram is what runs it?

01:51:45 2 A.   That is correct.

01:51:46 3 Q.   So two different functions; correct?

01:51:48 4 A.   Yes, but a copy is made.

01:52:11 5 Q.   And I asked you earlier: That's a traditional way

01:52:15 6 that computers -- computing devices run; correct?

01:52:18 7 A.   It's my understanding, yes.

01:52:19 8 Q.   That's because software doesn't operate -- doesn't

01:52:23 9 run from the SD card, it only runs from ram; right?

01:52:26 10 A.   For the PLC, yes. That's correct.

01:52:29 11 Q.   So that action, that copying, if it exists, has to

01:52:33 12 happen in order to run the software to run the equipment?

01:52:38 13 A.   Whenever there's a reboot, yes, that has to happen.

01:53:06 14   MS. KLIEBENSTEIN: No further questions, Your

01:53:07 15 Honor.

01:53:07 16   THE COURT: Thank you.

01:53:09 17   MS. FARNAN: I just have a very brief redirect,

01:53:11 18 Your Honor, if I may.

01:53:12 19   THE COURT: Yes, please.

01:53:12 20   REDIRECT EXAMINATION

01:53:14 21 BY MR. FINKELSON:

01:53:14 22 Q.   Mr. Packer, counsel asked you a moment ago whether

01:53:19 23 the Belvac software is functional, and you said yes. Do you

01:53:23 24 recall that testimony, sir?

01:53:24 25 A.   Yes, I did.

01:53:25 1 Q.   And did you understand that question to be asking you

01:53:30 2 whether the Belvac software performs functions?

01:53:32 3 A.   Yes. It controls the necker and it controls the

01:53:38 4 bodymaker.

01:53:39 5 Q.   Okay. And is that the basis on which you said yes to

01:53:42 6 that question?

01:53:42 7 A.   I don't know of another basis. Yes.

01:53:46 8 Q.   And you're not a lawyer, are you, Mr. Packer?

01:53:48 9 A.   No, I'm one -- one business law class. That's it.

01:53:54 10 Q.   Do you have any idea what it means for something to

01:53:56 11 be functional for purposes of copyright law purposes?

01:54:00 12 A.   No, I wouldn't venture to guess.

01:54:02 13 Q.   And your answer wasn't speaking to that in any way,

01:54:05 14 was it, sir?

01:54:06 15 A.   No, not at all. It was the -- yeah, the software

01:54:09 16 functions as it's intended to control the machine.

01:54:15 17   MR. FINKELSON: Mr. Packer, thank you for being

01:54:16 18 available here today. I have no further questions for you.

01:54:19 19   And, Your Honor, I would ask if the witness

01:54:21 20 could be dismissed.

01:54:22 21   THE COURT: That's fine. You may step down and

01:54:24 22 you are dismissed.

01:54:25 23   THE WITNESS: Thank you.

01:54:29 24   MR. FINKELSON: Your Honor, may I proceed with

01:54:41 25 argument in support of our motion for preliminary

01:54:43 1   injunction?

01:54:44 2   THE COURT: You may.

01:54:45 3   MR. FINKELSON: For all the ink spilled in the

01:54:47 4   briefing, Your Honor, about use, this is first and foremost

01:54:53 5   a case about Adonis unlawfully copying Belvac's copyrighted

01:54:59 6   software in violation of Belvac's exclusive reproduction

01:55:02 7   rights under the Copyright Act.

01:55:05 8   And Adonis has known this day was coming from

01:55:07 9   the moment it hatched its plan in the Bankruptcy Court. A

01:55:11 10 plan to purchase Vobev and to purchase the Belvac can-making

01:55:15 11 equipment at the Vobev facility without having to pay Belvac

01:55:19 12 the more than $13 million still due for that equipment.

01:55:25 13   To accomplish that plan, Vobev and Adonis

01:55:29 14 rejected the preexisting contracts between Belvac and Vobev.

01:55:35 15 Those contracts provided to Vobev and would have provided to

01:55:38 16 Adonis, had they been assigned a license, to use the Belvac

01:55:44 17 software.

01:55:46 18   Adonis said, No. We don't want a license, but

01:55:50 19 we want to use and reproduce Belvac software any way.

01:55:54 20   And the consequences of that choice have finally

01:55:57 21 come to roost in this Court. And that's because without a

01:56:02 22 license to the Belvac software and without any ownership

01:56:06 23 rights to the Belvac software, Adonis cannot and should not

01:56:10 24 be permitted to do what it now unabashedly seeks to do. And

01:56:15 25 that is to make infringing copies of the Belvac software in

01:56:19 1   the course of operating the Belvac machinery. And we would

01:56:24 2   submit to the Court that Belvac is entitled to a preliminary

01:56:27 3   injunction to ensure that doesn't happen.

01:56:31 4   In my time with the Court today, I'd like to

01:56:34 5   address the first two preliminary injunction factors, the

01:56:37 6   ones on which we bear a prima facie burden, likelihood of

01:56:41 7   success and irreparable harm. The other two factors are

01:56:47 8   well dealt with, I believe, in the briefing, Your Honor, and

01:56:49 9   both also counsel in favor of a preliminary injunction on

01:56:52 10   these facts.

01:56:53 11   Certainly, if the Court has questions about any

01:56:55 12   of those, or anything else, I'm happy to answer any

01:56:58 13   questions that the Court has.

01:56:59 14   Likelihood of success on the merits, what's the

01:57:03 15   standard? We have to show we're reasonably likely to

01:57:05 16   prevail on our copyright infringement and declaratory

01:57:11 17   judgment claims. That means under the Third Circuit case

01:57:13 18   laws articulated in the *Par Pharma* case, we have to show a

01:57:16 19   reasonable chance of winning. We have to show that that

01:57:18 20   chance is significantly better than negligible, but not

01:57:21 21   necessarily more likely than not.

01:57:22 22   And we far exceed, we submit, that threshold on

01:57:26 23   our claims here based on the evidence of record, which shows

01:57:30 24   copyright infringement based on a violation of Belvac's

01:57:34 25   exclusive reproduction right. A right that even Adonis

01:57:38 1   acknowledges is codified in the Copyright Act and that is

01:57:43 2   fully implicated here.

01:57:44 3   Adonis essentially makes four arguments to the

01:57:48 4   contrary. One of those is factual. Three of them are

01:57:53 5   legal. And none of which bear scrutiny.

01:57:57 6   I'd like to touch upon each of those, Your

01:57:59 7   Honor, because, frankly, a lot of it popped up in the latter

01:58:02 8   stages of the briefing on the preliminary injunction.

01:58:05 9   As to the factual argument first, the factual

01:58:08 10   argument from Adonis is we haven't done it yet. We haven't

01:58:13 11   done it yet.

01:58:15 12   That's what Mr. Gilbert said in his declaration.

01:58:19 13   He quite noticeably didn't say, because he couldn't possibly

01:58:23 14   say, that Adonis is not going to reproduce tomorrow or the

01:58:27 15   next day. And he's not here today to testify to say

01:58:31 16   otherwise.

01:58:31 17   Because there's no question, even if it's true

01:58:35 18   in the short two months time since the acquisition that

01:58:39 19   there hasn't been any reproduction yet, unlawful

01:58:42 20   reproduction by Adonis is inevitable and, in fact, imminent.

01:58:47 21   You heard that from Mr. Packer here today. That's one of

01:58:50 22   the reasons we thought it was so important, Your Honor, for

01:58:52 23   you to hear from him live, even though he had submitted

01:58:56 24   similar testimony in his declarations.

01:58:59 25   Inevitable and, in fact, imminent. Adonis

01:59:02 1   itself calls the reproduction essential. They do that in

01:59:07 2   support of an essential steps defense that I'm going to get

01:59:10 3   to that they don't have, but there's no question that this

01:59:13 4   software and the need to reproduce it is essential.

01:59:18 5   You heard about the two circumstances in which

01:59:21 6   there is going to be a copy made, if there hasn't been one

01:59:24 7   made already, of the Belvac software. The power on reboot

01:59:30 8   scenario and the external device access scenario. And the

01:59:34 9   necker parts are a glaring example of the imminence of that.

01:59:37 10   There was some cross-examination on that subject

01:59:39 11   today suggesting that Adonis has put those plans on hold.

01:59:44 12   Adonis hasn't brought a witness here to talk about that.

01:59:47 13   They haven't brought a witness here to say what their plans

01:59:49 14   are.

01:59:51 15   What we know is they rushed into Bankruptcy

01:59:54 16   Court in Salt Lake City and told the Bankruptcy Court they

01:59:57 17   absolutely, positively needed the necker parts immediately

02:00:01 18   or the sky was going to fall. And we were compelled to

02:00:06 19   deliver those necker parts by a date certain, and we have

02:00:09 20   delivered those necker parts by a date certain.

02:00:12 21   So this argument that I see coming that the

02:00:15 22   necker parts are just parked somewhere at Adonis never to be

02:00:19 23   used, I can't testify to that. Adonis counsel can't testify

02:00:22 24   to that. But it certainly would be very contrary to what

02:00:26 25   was represented to the Bankruptcy Court in seeking emergency

02:00:30 1   relief to have those parts delivered.

02:00:33 2   And, again, the necker parts are just a clear

02:00:35 3   example. There are many others that Mr. Packer testified

02:00:38 4   about of copying that is going to occur either through the

02:00:43 5   power on reboot process or the external device access

02:00:47 6   process.

02:00:47 7   And the *MAI* line of cases, that's from the Ninth

02:00:52 8   Circuit, the *Quantum* case from the Fourth Circuit, the *Live*

02:00:55 9   *On Face* case, all of those cases make clear that copying of

02:00:59 10   the kind that has occurred or will occur in the power on

02:01:03 11   reboot and external device access context are acts of

02:01:08 12   reproduction that constitute copyright infringement.

02:01:11 13   They don't debate that line of cases. They

02:01:14 14   don't cite any contrary authority.

02:01:17 15   And a preliminary injunction prohibiting from --

02:01:20 16   prohibiting Adonis, excuse me, from doing that is entirely

02:01:25 17   proper in these circumstances. Section 502(a) of the

02:01:28 18   Copyright Act authorizes injunctions, not to -- just to

02:01:32 19   restrain infringement that is ongoing, but to prevent

02:01:37 20   infringement that hasn't happened yet.

02:01:41 21   The *Naughty's* case from the Eastern District of

02:01:43 22   Texas spells that out. We also cited the *Violet Crown* case

02:01:48 23   from the Northern District of Texas, which it deals with

02:01:50 24   preliminary injunctions and the related context of trademark

02:01:54 25   infringement.

02:01:54 1   It's all the more appropriate here to issue a

02:01:58 2   preliminary injunction, we would submit, Your Honor, given

02:02:00 3   our declaratory judgment claim. That claim is directed

02:02:03 4   specifically to imminent infringement. It's Count II of our

02:02:08 5   Complaint.

02:02:08 6   And imminent infringement is, at best, for

02:02:12 7   Adonis what we have here. That's the factual argument and

02:02:17 8   it doesn't fly.

02:02:18 9   They make three legal arguments for why those

02:02:24 10 acts of reproduction either don't constitute copyright

02:02:28 11 infringement or fall within an exception. And I want to

02:02:31 12 address each of those.

02:02:32 13   The first thing I'd say about all three of these

02:02:34 14 arguments is they were raised for the first time in a

02:02:37 15 sur-reply brief. They address issues that -- at least

02:02:42 16 certain issues that were well covered in our opening brief.

02:02:45 17 They should have been advanced earlier, and we submit that

02:02:48 18 they were waived by not being advanced earlier. But the

02:02:50 19 fact is that they're simply wrong.

02:02:53 20   The first of those arguments that Adonis makes

02:02:55 21 in sur-reply is that its reproduction is or will be

02:03:01 22 transitory and is, therefore, non-infringing. The law and

02:03:05 23 the facts are to the contrary on that point, Your Honor.

02:03:09 24   The cases that Adonis itself cites make clear

02:03:14 25 that when a copy is made and exists for more than an

02:03:19 1   infinitesimal amount of time, it is nontransitory and, thus,

02:03:24 2   infringing. The only example of a transitory instance of

02:03:30 3   copying that Adonis flags in its briefs is from the *Cartoon*

02:03:35 4   *Network* case where the copy was made and existed for

02:03:38 5   1.2 seconds.

02:03:40 6   But Adonis' own cases point out the flip side of

02:03:45 7   the coin. They point out the circumstances where a copy is

02:03:51 8   nontransitory.

02:03:53 9   And we have at least three examples of

02:03:55 10 nontransitory copies that are flagged by Adonis' own cited

02:04:00 11 cases. That's *Cartoon Network* and *CDK Global.* One

02:04:04 12 nontransitory where the copy exists in ram or elsewhere for

02:04:08 13 at least several minutes. That's *Cartoon Network* discussing

02:04:11 14 the *MAI* case.

02:04:13 15   Or, two, a copy that exists while the computer

02:04:18 16 is in use by a human technician. That's Adonis' *CDK* case

02:04:24 17 citing the *Triad* case.

02:04:25 18   Or, three, the copy exists until the system is

02:04:29 19 turned off. Again, *Cartoon Network* discussing *MAI.*

02:04:33 20   Our facts, as you just heard from Mr. Packer,

02:04:37 21 put this case squarely in the nontransitory category,

02:04:41 22 recognized by their own cases. Whether the copy is made

02:04:45 23 during the PLC power on reboot process or the copy is made

02:04:50 24 during the process of accessing the PLC software from an

02:04:53 25 external device, that copy lasts sufficiently long to meet

02:04:58 1   the reproduction duration threshold.

02:05:01 2   Power on reboot, the copy created lasts in the

02:05:05 3   ram of the PLC all the way until the PLC is powered off,

02:05:09 4   which Adonis itself, in arguing they haven't done it yet in

02:05:12 5   the last two months, concedes can be weeks or months.

02:05:16 6   External device access, the copy that's first

02:05:19 7   created on the external device will last in the nonvolatile

02:05:23 8   memory of the external device until deleted by the user.

02:05:27 9   Again, that could be weeks or months. And if a copy already

02:05:30 10   exists on the external device and the device accesses it,

02:05:35 11   another copy is created in the ram of the external device

02:05:38 12   and will last there as long as the ram copy remains open on

02:05:43 13   the device. All examples of quintessentially nontransitory

02:05:48 14   use. So there is no transitory exception to Adonis'

02:05:54 15   infringement.

02:05:55 16   The second argument they make is that their

02:05:58 17   infringement falls within the exception created by the

02:06:03 18   essential step doctrine. And they fare no better there.

02:06:07 19   The essential step doctrine, which as Your Honor

02:06:09 20   knows is analogous to the first-sale doctrine, which was

02:06:14 21   briefed extensively by the parties in the Bankruptcy Court

02:06:16 22   and, again, dealt with in our opening brief, can only be

02:06:19 23   invoked by a party who owns, who owns the copy of the

02:06:24 24   software in question.

02:06:24 25   It doesn't matter how essential the software is.

02:06:27 1   We agree it's essential. You cannot raise the essential

02:06:32 2   step doctrine as a defense if you are not an owner of the

02:06:36 3   copy of the software.

02:06:38 4   Adonis is not, is not such a party. They are

02:06:44 5   not an owner of any copy of Belvac software. That was made

02:06:50 6   clear in the Bankruptcy Court, and it's clear from the terms

02:06:53 7   of the underlying agreements between Vobev and Belvac.

02:06:59 8   First, the bankruptcy case. What happened in

02:07:02 9   the bankruptcy case? In order to push this sale through and

02:07:07 10   secure approval of it from the Bankruptcy Court, Vobev's

02:07:11 11   counsel, directly and unequivocally, represented to the

02:07:14 12   Bankruptcy Court that Vobev did not own the software. Vobev

02:07:20 13   was represented by Mr. Galardi of Ropes & Gray. And we

02:07:25 14   pointed your Court -- the Court to a portion of the

02:07:28 15   transcript from the bankruptcy case where the Bankruptcy

02:07:31 16   Court addressed this issue.

02:07:31 17   It's DI-9-8 at Page 40. And the Court is

02:07:38 18   reciting the representations that had been made by Vobev and

02:07:41 19   Vobev's counsel. And the Court said, "I'm sorry, but

02:07:44 20   Mr. Galardi" -- Vobev's counsel -- "says very clearly the

02:07:49 21   software is not the property of the estate. Vobev doesn't

02:07:54 22   own it."

02:07:55 23   THE COURT: I just want to be very clear for the

02:07:57 24   record. There seemed to be, at some portions of the

02:08:05 25   Bankruptcy Court record, some confusion or at least

02:08:12 1   imprecise language distinguishing between intellectual

02:08:18 2   property in terms of rights to the software as opposed to

02:08:22 3   the actual software that resides on the machine.

02:08:24 4   So just very clearly for us, do you understand

02:08:28 5   them to have been telling the bankruptcy Judge that in

02:08:32 6   taking possession of the machines that they would not own

02:08:36 7   the copy of the software that is on the machine?

02:08:40 8   MR. FINKELSON: Absolutely 100 percent. And

02:08:42 9   Your Honor is right. I don't know whether there was

02:08:44 10   confusion. There was certainly some attempts to kind of, I

02:08:47 11   would say, thread that needle in some of the language that

02:08:50 12   is used -- was used at various times, both by Vobev counsel

02:08:54 13   and Adonis counsel.

02:08:56 14   This is clear. It's clear from the statements

02:08:59 15   that Mr. Galardi made on the record. It is clear from the

02:09:03 16   fact that the Court then went on.

02:09:05 17   This is also at DI-9-8 at Page 41. The Court

02:09:09 18   went on to say, based on that representation that I just

02:09:12 19   read, Your Honor, "I'm going to give you a preliminary

02:09:15 20   ruling that the Debtor does not own this software."

02:09:19 21   It is --

02:09:20 22   THE COURT: And so -- and I get -- and you

02:09:22 23   understood the Judge to be saying at that point does not own

02:09:24 24   the copy of the software that resides on the machine?

02:09:28 25   MR. FINKELSON: Absolutely. As distinguished

02:09:31 1   from does not own the IP, or does not own the intellectual

02:09:34 2   property or doesn't have a license to the intellectual

02:09:37 3   property. The representation was clear and creates judicial

02:09:43 4   estoppel under the case law cited in our briefs.

02:09:46 5   But, frankly, more importantly, is just clear on

02:09:49 6   behalf of Vobev, which was hand in hand with Adonis through

02:09:52 7   every step of these proceedings. It was a clear

02:09:55 8   representation about ownership of the software.

02:09:59 9   There were other representations made about IP

02:10:02 10   and about copyrights, but these representations were about

02:10:06 11   the software. When it came to copyrights, and this is

02:10:10 12   really the bait and switch that we're dealing with here, we

02:10:13 13   tried to stop the sale.

02:10:16 14   We raised copyright infringement as to the

02:10:19 15   distribution. And Vobev and Adonis said, No, no, Bankruptcy

02:10:23 16   Court, you don't need to worry about that here because

02:10:27 17   Belvac's going to have all of its rights to claim copyright

02:10:30 18   infringement in front of Your Honor in Delaware.

02:10:32 19   Then we get to Delaware --

02:10:33 20   THE COURT: Well, they said that, but they,

02:10:35 21   also, I think, were clear with the Bankruptcy Court that

02:10:38 22   they thought they were going to beat you here in Delaware --

02:10:38 23   MR. FINKELSON: Absolutely.

02:10:41 24   THE COURT: -- for various reasons.

02:10:42 25   MR. FINKELSON: Absolutely. They thought they

02:10:44 1   were going to beat us here. I don't know that they

02:10:46 2   absolutely said, Yes, they have all their rights that they

02:10:49 3   have in Delaware, but lo and behold they have no rights at

02:10:53 4   all, which is what's come out in the briefing.

02:10:55 5   But, nonetheless, as to Your Honor's specific

02:10:57 6   question, this deals with ownership of the copy of the

02:11:02 7   software, not ownership of the IP. And the Asset Purchase

02:11:07 8   Agreement reflects that, right. Because in the Asset

02:11:10 9   Purchase Agreement, Vobev only sells to Adonis what it owns.

02:11:14 10   And at Paragraph 2.2 of that Asset Purchase

02:11:18 11   Agreement, I think it's subsection I. And this is DI-9-7,

02:11:23 12   "Assets that are excluded from the sale include all rights

02:11:27 13   to any software used in any computer equipment included in

02:11:32 14   the purchased assets."

02:11:33 15   And then there's additional language "to the

02:11:35 16   extent not freely transferrable to purchaser." But there

02:11:39 17   was never an argument in the Bankruptcy Court that the copy

02:11:42 18   of the software was freely transferrable to Adonis free and

02:11:48 19   clear of our copyright infringement claims.

02:11:52 20   THE COURT: And just to be clear, you understand

02:11:55 21   the Asset Purchase Agreement reference to software to mean

02:11:58 22   the actual copy of the software that resides on the

02:12:01 23   machines?

02:12:02 24   MR. FINKELSON: I do. I do in that instance.

02:12:04 25   Yes.

02:12:04 1   THE COURT: And the reason why I asked was it

02:12:07 2   was not clear to me, looking at the Bankruptcy Court Sale

02:12:13 3   Order, which I'm having a hard time putting my finger on at

02:12:16 4   the moment. But the part where it talks about having rights

02:12:22 5   to the IP, that makes it sound like something different than

02:12:26 6   what we're talking about here.

02:12:27 7   MR. FINKELSON: It is. And that was in -- I

02:12:29 8   would think as best characterized as an -- as an in addition

02:12:33 9   language that we insisted upon for purposes of the sale and

02:12:41 10   got over Adonis' objection in the same hearing transcript

02:12:46 11   that I pointed Your Honor to. That language about

02:12:49 12   maintaining intellectual property rights, et cetera, et

02:12:52 13   cetera, that was a section that was added to the Asset

02:12:57 14   Purchase Agreement as part of the process that I just

02:13:00 15   described to the Court.

02:13:01 16   THE COURT: And I don't want to get too far

02:13:04 17   afield here because I understand your inter partes argument,

02:13:10 18   what we're talking about, likelihood of success of showing

02:13:13 19   copyright infringement. But I think we all understand that

02:13:17 20   part of the reason why we're here today is that -- so

02:13:20 21   there's a record to show the District Court an appeal of the

02:13:26 22   bankruptcy case, what's going on over here, which is fine.

02:13:28 23   So let's all just air it all out.

02:13:30 24   Did the bankruptcy Judge understand that, once

02:13:35 25   that sale went through, that the machines actually had the

02:13:39 1   copy of the software on them, that that was going to get

02:13:43 2   transferred? Your side made that argument to the Judge.

02:13:46 3   The Judge said they didn't want to hear anything about

02:13:49 4   copyright infringement, which is understandable because it

02:13:52 5   wasn't really appropriate to do that there.

02:13:54 6   But did the Judge understand that the copy was

02:13:56 7   on there and that the copy has now been transferred,

02:13:58 8   notwithstanding that Adonis didn't have title to the copy of

02:14:03 9   the software?

02:14:04 10   MR. FINKELSON: I rarely say to a Judge that

02:14:07 11   that's an unfair question, but I don't -- I don't know what

02:14:10 12   the Judge actually understood. We certainly tried to

02:14:14 13   present that issue, Your Honor, to the Judge in the

02:14:17 14   bankruptcy proceeding.

02:14:20 15   My interpretation of what Judge Marker did was

02:14:24 16   to say, All of this stuff can be dealt with in Delaware.

02:14:28 17   I'm moving -- I'm approving the sale. The equipment -- the

02:14:33 18   equipment is owned by Adonis -- owned by Vobev and is being

02:14:38 19   sold to Adonis.

02:14:39 20   As to the copy of the software, he specifically

02:14:42 21   said, I'm giving you a preliminary ruling that they don't

02:14:45 22   own the software. They are not transferring ownership of

02:14:49 23   the software. I do think he understood that they were

02:14:52 24   transferring a copy of the software that they do not own to

02:14:57 25   Vobev.

02:14:57 1   And left for this Court to decide the to the

02:15:03 2   extent not freely transferrable to the purchaser issue

02:15:07 3   which, again, I mean, we're talking about what happened in

02:15:09 4   front of the bankruptcy case. We found that evidence

02:15:12 5   compelling.

02:15:12 6   But the fact is if this Court does the analysis

02:15:15 7   of the essential step doctrine in the first instance, we get

02:15:19 8   to the same outcome. Because if you look at the factors for

02:15:23 9   determining ownership versus license, take the factors set

02:15:27 10   out in the Ninth Circuit in the *Vernor* case, right. You

02:15:30 11   look at three things.

02:15:31 12   You look at the underlying agreements to see

02:15:34 13   whether they specify that the user is granted a license.

02:15:37 14   You look at whether those underlying agreements

02:15:40 15   significantly restrict the user's ability to transfer the

02:15:44 16   copy of the software, and or you look at whether the

02:15:48 17   agreements impose notable use restrictions.

02:15:51 18   And on all three counts, these underlying

02:15:55 19   agreements with Vobev could not be clearer, we would submit

02:15:58 20   to the Court. The language that I would direct Your Honor

02:16:01 21   to for consideration -- there are multiple contracts entered

02:16:06 22   between Vobev and Belvac, so you have all of those in the

02:16:09 23   record. They're identical in all material respects to this

02:16:12 24   issue.

02:16:13 25   The key section is Section 12.05. And the cases

02:16:17 1   that debate, right, Adonis cites the *Krauss* case, and says

02:16:22 2   the *Krauss* case is totally on par with this case. Let me

02:16:26 3   remind Adonis and the Court, there was no license, written

02:16:29 4   License Agreement in the *Krauss* case.

02:16:31 5   The cases that debate whether a license really

02:16:35 6   means that it's a license don't have anything like the

02:16:39 7   language that is in Section 12.05, which makes it

02:16:44 8   unequivocal that there is no ownership to the software copy

02:16:48 9   being given to Vobev. It says, "Software is licensed, not

02:16:53 10   sold, for Purchaser's use."

02:16:55 11   It goes on to say, just so there's no confusion,

02:16:58 12   the "Aforementioned license confers no title or ownership in

02:17:03 13   the Purchaser to the software and may not be construed as

02:17:09 14   any sale of any rights in the software to the Purchaser."

02:17:14 15   It's not saying the IP. It's not saying the

02:17:17 16   copyrights. It is saying the software, which is precisely

02:17:22 17   the issue presented in the essential step and first-sale

02:17:29 18   doctrine case law that deals with ownership versus license.

02:17:32 19   So that should end the inquiry, but the

02:17:36 20   agreements went on to deal with there being no right to

02:17:39 21   transfer. Second factor that the framework asks us to look

02:17:44 22   at.

02:17:45 23   12.05 says, "The license is non-transferrable."

02:17:50 24   It then goes on later in 12.05. 12.05(a) and

02:17:55 25   says, I'm quoting, but with ellipses, "Purchaser shall not

02:18:01 1 transfer the software."

02:18:07 2   So transfer is absolutely prohibited in the

02:18:09 3 terms of the agreement, which is an indication of a license,

02:18:12 4 not ownership.

02:18:13 5   Same goes for use restrictions. 12.05 refers to

02:18:17 6 the license as a "limited license." It can only be used

02:18:23 7 specifically for one thing, "solely in connection with the

02:18:27 8 operation of the equipment."

02:18:29 9   There's limitations in 12.05(a) about various

02:18:34 10 uses that Vobev, as a licensee, could not make of the

02:18:39 11 software. In 12.05(b), the use of the software must cease

02:18:45 12 upon default. So this isn't like *Krauss* where the use was

02:18:48 13 in perpetuity. The agreement itself says "must cease use

02:18:52 14 upon default."

02:18:53 15   And then you have Belvac also having audit

02:18:56 16 rights to audit any use of the software by the licensee. So

02:19:02 17 you have a clear unequivocal expression in the contract that

02:19:06 18 it's licensed not owned. You have transfer restrictions

02:19:10 19 that are wholly consistent with that in the agreements

02:19:13 20 themselves. And you have use restrictions that are wholly

02:19:16 21 aligned with that in the agreement themselves as well.

02:19:18 22   So whatever weight the Court wants to give to

02:19:22 23 the Bankruptcy Court statements, both in characterizing what

02:19:26 24 Vobev said with Adonis' blessing or what the Judge said in a

02:19:31 25 preliminary ruling, it doesn't change the analysis. If the

02:19:35 1   Court does this analysis in the first instance here and

02:19:39 2   looks at the relevant factors, this is not an ownership

02:19:44 3   situation. And with no ownership in the software by Adonis,

02:19:48 4   there is no essential step defense.

02:19:51 5   THE COURT: Can I just ask you: How do I

02:19:53 6   connect the Court's "preliminary ruling" to what it

02:19:57 7   ultimately signed in the Sale Order?

02:20:01 8   MR. FINKELSON: It happened very quickly. I was

02:20:04 9   at that hearing by Zoom. All the hearings were by Zoom.

02:20:10 10   The Court -- this discussion, and you'll see it

02:20:14 11   in the transcript, this is a debate where we're saying,

02:20:19 12   Judge, you need to deal with this issue now because this

02:20:22 13   software is about to go out the door to Adonis and which we

02:20:29 14   didn't think was proper. We thought that was a violation of

02:20:32 15   our exclusive right to distribute under the Copyright Act.

02:20:36 16   And Adonis is saying and Vobev are saying, No,

02:20:39 17   no, no. This can all be dealt with in Delaware. So the

02:20:43 18   Court is basically turning to me -- the next question --

02:20:46 19   after he says, I'm sorry, but Mr. Galardi says very clearly

02:20:50 20   the software is not the property of the estate. Vobev

02:20:53 21   doesn't own it. My memory is Judge Marker then turned to me

02:20:56 22   and said, "So what's the problem?"

02:20:58 23   In other words, you're saying they're arguing

02:21:02 24   that -- they're going to argue that they own it. They're

02:21:05 25   saying flat out -- because all of this is in response to

02:21:08 1   first-sale doctrine, and I didn't mention that point. So

02:21:11 2   all of this is in the context of an argument under the

02:21:16 3   first-sale doctrine and before the Bankruptcy Court where

02:21:18 4   we're telling the Bankruptcy Court, They don't own it.

02:21:23 5   It's exactly the same issue presented by the

02:21:27 6   essential step doctrine. And Judge Marker is basically

02:21:29 7   saying, I don't need to decide that because Vobev and Adonis

02:21:32 8   themselves are saying they don't own it. So, Mr. Finkelson,

02:21:37 9   what's the problem?

02:21:38 10   And he then goes on to give the preliminary

02:21:40 11   ruling right after that. It's literally -- it's less than a

02:21:45 12   page later. He gives the preliminary ruling and then says,

02:21:50 13   "So I am going to approve this sale with the language that

02:21:55 14   Adonis and Vobev have proposed."

02:21:58 15   THE COURT: And just to be clear for the record,

02:22:01 16   in fairness to the bankruptcy Judge, my own experience,

02:22:07 17   reading through these briefs, has demonstrated that these

02:22:10 18   issues have been getting crystallized as the parties'

02:22:15 19   briefing proceeds. And the arguments are now starting to

02:22:18 20   converge toward an appropriate analysis under the law. But

02:22:22 21   they haven't always been before the Bankruptcy Court or

02:22:26 22   here.

02:22:27 23   MR. FINKELSON: And I -- to be clear on the

02:22:30 24   transcript and otherwise, I believe the Bankruptcy Court did

02:22:34 25   its best to work through the issues that were being

02:22:37 1   presented.

02:22:38 2   Has there been a crystallization of arguments on

02:22:42 3   both sides? There has.

02:22:43 4   THE COURT: Thank you for that.

02:22:44 5   MR. FINKELSON: There has. And that's, frankly,

02:22:48 6   why I'm spending so much time talking about reproduction,

02:22:52 7   because that's really where the fight is. And we disagree

02:22:54 8   with each other on the use issue, which is, I think, a fair

02:22:58 9   dispute in many respects, much more complex dispute. But

02:23:01 10   it's not necessary to decide this motion without talking

02:23:05 11   about anything but reproduction, in our view.

02:23:08 12   THE COURT: I told you at the beginning I was

02:23:10 13   tracking and I'm still tracking.

02:23:11 14   MR. FINKELSON: Okay. So the last -- unless

02:23:13 15   Your Honor has any other questions on essential step, the

02:23:16 16   last defense that comes up in sur-reply as part of this

02:23:19 17   crystallization -- and really for the first time, this is

02:23:21 18   not something we had heard at any point before -- is a fair

02:23:25 19   use defense, which Adonis asserts in the sur-reply brief.

02:23:31 20   Your Honor, fair use has never -- and Adonis

02:23:36 21   doesn't cite any case saying otherwise -- it's never been

02:23:39 22   applied in these circumstances where you have an infringer

02:23:43 23   reproducing the totality of the copyrighted material to make

02:23:47 24   commercial use of the copyrighted material itself. The only

02:23:52 25   cases they cite are the cases -- line of cases out of the

02:23:55 1   Ninth Circuit. The *Sony* case and the *Sega* case that apply

02:23:58 2   fair use in a very specific context that has nothing to do

02:24:02 3   with what we have here.

02:24:03 4   That context in those cases is intermediate

02:24:07 5   copying that's performed during software disassembly or

02:24:13 6   reengineering for the purpose of accessing the parts of the

02:24:18 7   software code that are non-copyrightable in order to create

02:24:24 8   a machine that's compatible with those non-copyrightable

02:24:29 9   elements, but not to use, the copyrighted material itself,

02:24:31 10   in that ultimate machine.

02:24:33 11   That's what those cases are about. We have none

02:24:37 12   of those facts here, nor is that remotely analogous to the

02:24:41 13   circumstance here.

02:24:42 14   We have Adonis reproducing the software in toto

02:24:47 15   and using it in exactly the form in which it is copyrighted.

02:24:53 16   So there's no case that has ever applied fair use that we're

02:24:58 17   aware of, and Adonis certainly hasn't cited one, in those

02:25:02 18   circumstances.

02:25:03 19   And if you look at the four fair use statutory

02:25:06 20   factors under Section 107 and you go through that analysis,

02:25:10 21   it leads to the same result, we would submit, that fair use

02:25:14 22   doesn't apply here.

02:25:15 23   The first is the purpose and character of the

02:25:18 24   use, whether it's a commercial use, or for nonprofit or

02:25:21 25   educational purposes. Here the use is purely commercial.

02:25:26 1   It's also complete copying as opposed to

02:25:28 2   intermediate, distinguishing it from the *Sony* and *Sega*

02:25:32 3   circumstance. And it's wholly non-transformative as a

02:25:35 4   result because they're not making any changes.

02:25:38 5   So the first factor says no fair use.

02:25:40 6   The second factor is the nature of the

02:25:43 7   copyrighted work. Adonis argued with some support that the

02:25:47 8   cases point out that there are instances where computer

02:25:50 9   software may get somewhat less protection on that factor.

02:25:54 10   But here where you've got a complete copy of the expressive

02:25:58 11   components, we would submit that there's no reason to place

02:26:01 12   computer software on any different footing.

02:26:04 13   The third factor is the amount and

02:26:06 14   substantiality of the portion used in relation to the

02:26:09 15   copyrighted work. A hundred percent is a hundred percent.

02:26:11 16   And the fourth is the effect upon the potential

02:26:13 17   market or value of the copyrighted work. And if anyone who

02:26:18 18   gets their hands on this code is allowed to use it, as

02:26:22 19   Adonis says, and if we lose control of our copyrighted

02:26:26 20   software, as you heard from Mr. Packer, we're going to

02:26:29 21   suffer irreparable harm.

02:26:31 22   On the flip side of the ledger is zero public

02:26:35 23   benefit that is achieved by Adonis copying the code in toto

02:26:41 24   and making a non-transformative copy that doesn't create any

02:26:45 25   form of new expression. If you look at the cases on fair

02:26:47 1   use, that's what they're looking at, how transformative is

02:26:51 2   this, how much is being used. Is there -- is it an

02:26:54 3   intermediate step to a new expression.

02:26:57 4   None of that. None of that is in play here.

02:27:00 5   So, for those reasons, Your Honor, the fair use

02:27:04 6   defense doesn't apply to these circumstances, either. We

02:27:07 7   own valid copyrights to the software. That's not disputed.

02:27:12 8   Adonis has or will violate our exclusive rights

02:27:16 9   to reproduce the software inevitably and imminently. And

02:27:21 10   there's no nontransitory essential step or fair use

02:27:25 11   exception to Adonis' infringement.

02:27:27 12   So that's, in our view, Your Honor, likelihood

02:27:31 13   of success on the merits. And I will pivot now more briefly

02:27:37 14   to irreparable harm, unless Your Honor has additional

02:27:39 15   questions.

02:27:39 16   THE COURT: Can I just ask you, as long as we're

02:27:41 17   combining the argument for the preliminary injunction with

02:27:44 18   the motion to dismiss: Going back to our discussion about

02:27:50 19   issues crystallizing, the Complaint, as it stands now, one

02:27:58 20   could reasonably argue, and Defendant has argued that it

02:28:02 21   doesn't really specify what the copying is, at least not to

02:28:09 22   the extent that you specified today.

02:28:14 23   If the Court were to say that maybe filing an

02:28:18 24   Amended Complaint to specify what you've put evidence on

02:28:24 25   today, for example, the copy going into the ram of a laptop

02:28:30 1   and the computer that controls the machines -- if the Court

02:28:34 2   were to allow you to do that, would you like that

02:28:37 3   opportunity?

02:28:37 4   MR. FINKELSON: Yes, Your Honor.

02:28:38 5   THE COURT: Okay.

02:28:39 6   MR. FINKELSON: And to be clear, my colleague,

02:28:43 7   Mr. Smith, was going to argue the motion to dismiss. I

02:28:46 8   don't think it's necessary because I think the issues are

02:28:48 9   quite clear.

02:28:48 10   We felt like they -- we sufficiently pled our

02:28:51 11   claims. Is there additional -- are there additional facts

02:28:55 12   that are clear? Absolutely. It is noticed pleading, and

02:29:00 13   the goal is to make sure the Defendant is on notice of

02:29:03 14   what's at issue.

02:29:04 15   There's no -- Adonis is the most on notice party

02:29:06 16   I'm aware of because we've been talking about this since the

02:29:09 17   Bankruptcy Court, even before we filed the Complaint. But,

02:29:11 18   Your Honor, Your Honor asked me a very clear question. And,

02:29:14 19   yes, if Your Honor believes that we should more fully

02:29:17 20   articulate the facts and will give us the leave to do so, we

02:29:20 21   would like to take that opportunity. And we will -- and we

02:29:25 22   will -- and we will repeat the facts that have been fleshed

02:29:28 23   out in the briefing, and we will state more clearly or, to

02:29:33 24   use Your Honor's word, in a better crystallized way what the

02:29:36 25   theories of infringement are.

02:29:38 1   THE COURT: And I appreciate that. I guess the

02:29:40 2   only thing I would take issue with is the statement that it

02:29:42 3   was clear to begin with. Because, again, as evidenced by

02:29:47 4   the fact that we didn't get to what the fact of the copying

02:29:52 5   was until late in the briefing, one might argue, not

02:29:55 6   unreasonably, that it wasn't clear.

02:29:58 7   MR. FINKELSON: Understood and well taken, Your

02:30:00 8   Honor.

02:30:00 9   THE COURT: All right. Thank you.

02:30:02 10   MR. FINKELSON: May I move to irreparable harm?

02:30:04 11   THE COURT: Yes.

02:30:05 12   MR. FINKELSON: So on irreparable harm, Your

02:30:07 13   Honor, the standard is whether we are likely to suffer

02:30:14 14   irreparable injury without relief, and the Third Circuit,

02:30:16 15   the *Silvertop* case, no detailed showing is required. And

02:30:21 16   irreparable harm is shown if there's a threat of future

02:30:25 17   infringement with its attendant loss of control, reputation

02:30:29 18   and goodwill. That's *Silvertop*. That's *Telebrands*.

02:30:33 19   And we would submit that there's no question

02:30:35 20   that's the case here. We're not arguing for a presumption

02:30:38 21   of irreparable harm. We never have been. That presumption

02:30:42 22   doesn't exist.

02:30:43 23   But the case law does clearly set forth what the

02:30:46 24   analysis is, and we believe, as you heard further from

02:30:49 25   Mr. Packer today, we've identified three ways in which

02:30:53 1 Belvac is likely to be irreparably harmed by Adonis' use and

02:30:57 2 reproduction and by Belvac's loss of control over its

02:31:00 3 software.

02:31:01 4   THE COURT: Let me ask you this: There's also a

02:31:06 5 requirement in the law that the irreparable harm has to be

02:31:14 6 causally attributed to the actual infringement. And what I

02:31:18 7 heard the witness say on the stand was that if Defendant had

02:31:24 8 a License Agreement that there would also be some sort of a

02:31:27 9 service plan and control over the software.

02:31:30 10   And I get that that's how it has played out in

02:31:33 11 your client's business. But the harm that the witness was

02:31:38 12 talking about didn't seem to me to be harm that resulted

02:31:42 13 from a copy being made on the ram. It seemed to me to be

02:31:46 14 harm because they haven't agreed to your -- they haven't

02:31:48 15 assumed the license that Belvac has -- maybe I said that

02:31:54 16 wrong.

02:31:54 17   Do you understand what I'm asking?

02:31:56 18   MR. FINKELSON: I do, Your Honor. I would take

02:31:57 19 issue with it, respectfully.

02:31:59 20   We have endeavored to tie the harm that we're

02:32:03 21 talking about here to the acts of liability. One of the

02:32:06 22 instances that Mr. Packer talked about was the instance in

02:32:11 23 which Adonis, by virtue of reproducing -- one of the reasons

02:32:15 24 they -- one of the ways they reproduce is by going in and

02:32:18 25 making modifications to the software. That's an infringing

02:32:22 1   act itself. And the harm that flows from that type of

02:32:25 2   modification, whether it's a safety-related harm or a

02:32:29 3   quality-related harm is directly and causally tied to the

02:32:33 4   fact of reproduction. You certainly have additional harms

02:32:38 5   that we've pointed to that are tied to use

02:32:45 6   post-reproduction, but, again, that -- that doesn't happen,

02:32:47 7   but for the act of reproduction in the first instance.

02:32:51 8   So we were mindful of Your Honor's concern. We

02:32:55 9   tried to address that with Mr. Packer's testimony. But to

02:32:59 10   be clear, in our view, the irreparable harm here flows

02:33:03 11   directly from the liability, the acts of liability that

02:33:09 12   we're alleging, the copyright infringement through

02:33:12 13   reproduction that we are alleging.

02:33:14 14   And, certainly, one of the harms that we are

02:33:16 15   suffering, in addition to safety-related reputational harms

02:33:20 16   and quality-related reputational harms, is the loss of

02:33:24 17   control over our IP. We are in a forced license scenario.

02:33:29 18   And as Your Honor knows, there's case law recognizing that

02:33:33 19   forced license itself as irreparable harm. There's some

02:33:35 20   nuance in that, to be sure, that's been played out as that

02:33:37 21   line of cases has evolved.

02:33:38 22   But we are in a -- essentially, if Adonis is to

02:33:42 23   be believed here and is to prevail, we are in a forced

02:33:46 24   license scenario where we will have somebody reproducing our

02:33:50 25   software in a way that we have no control over where we bear

02:33:54 1   all the risks of that uncontrolled reproduction.

02:33:59 2   And that is a causal connection between the act

02:34:03 3   of infringement and the harm that is caused. Because when

02:34:08 4   it comes to safety and it comes to quality, it's routine to

02:34:12 5   modify parameters on these machines by accessing the PLC

02:34:16 6   code. That's uncontested.

02:34:18 7   And accessing the PLC code is an act of

02:34:22 8   infringement. It's a reproduction. And that reproduction

02:34:26 9   that then results in cans that come out imperfectly, or that

02:34:31 10   require shutdown of the machines or that, God forbid, hurt

02:34:36 11   somebody, all flows downstream to Adonis' customers. And,

02:34:42 12   as Mr. Packer pointed out in his testimony about the close

02:34:47 13   nature of this community, and as we pointed out in the

02:34:49 14   briefs, Adonis itself tells the world or Vobev before Adonis

02:34:53 15   that they use our equipment.

02:34:55 16   So bad quality, missed orders, hurt people. The

02:35:00 17   relevant community knows if that's happened at what is now

02:35:04 18   Adonis' facility, that's Belvac's equipment.

02:35:10 19   And that, Your Honor, is the irreparable harm.

02:35:12 20   And we submit it is casually connected to the infringing

02:35:17 21   acts and a preliminary injunction should issue to stop it.

02:35:20 22   And with that, Your Honor, just so I have a

02:35:23 23   little bit of our time left in rebuttal -- unless Your Honor

02:35:27 24   has any other questions -- I'll pass the podium.

02:35:32 25   THE COURT: All right. Thanks very much.

02:35:33 1   Let's go ahead and take a break so we can give

02:35:36 2   the court reporter a few minutes. It's 2:35. We'll break

02:35:39 3   for ten minutes until 2:45.

02:35:42 4   DEPUTY CLERK: All rise.

02:44:06 5   (Recess was taken.)

02:51:16 6   DEPUTY CLERK: All rise.

02:51:17 7   THE COURT: Please be seated. Let's proceed.

02:51:23 8   MS. KLIEBENSTEIN: Thank you, Your Honor. The

02:51:28 9   history between the parties, the complexity of the factual

02:51:31 10   and the legal issues and whatever happened during the

02:51:35 11   bankruptcy proceedings, all of that becomes diminished when

02:51:39 12   we remember the purpose of a preliminary injunction. The

02:51:43 13   threat to shut down my client's business.

02:51:47 14   The purpose of a preliminary injunction is to

02:51:49 15   preserve the status quo and maintain the current state of

02:51:54 16   affairs. The status quo, Your Honor, in my opinion, is

02:51:58 17   already being preserved right now.

02:52:02 18   Throughout this afternoon, it appears that the

02:52:05 19   Plaintiff acknowledges that use on ram, while the machine is

02:52:09 20   running, is not copyright infringement. It appears to admit

02:52:13 21   that what Adonis is doing now is not copyright infringement.

02:52:17 22   So then the question becomes: When the machine

02:52:22 23   is -- if the machines are turned on and off or if an

02:52:25 24   external device is plugged in, what is the irreparable harm

02:52:28 25   that stems from that? Adonis is doing nothing more today

02:52:34 1   than Vobev was doing six months ago then the parties were

02:52:39 2   doing through the bankruptcy proceedings, and since they've

02:52:41 3   been doing since February 7th. Adonis is not on the cusp of

02:52:44 4   reselling Belvac's software. It's not on the cusp of

02:52:48 5   stealing Belvac's other customers.

02:52:49 6   In contrast to a trademark case, for example,

02:52:53 7   Adonis is not tricking third-party customers in any way.

02:52:57 8   Adonis' customers don't care how the cans are made, they

02:53:00 9   just need them made. Belvac is not experiencing real harm.

02:53:06 10   This lawsuit is primarily a breach of contract

02:53:09 11   action. Belvac wants to be repaid for the 14 million that

02:53:12 12   it asserts it's owed from the business dealings of the

02:53:16 13   parties beforehand. The right place for that dispute is not

02:53:22 14   in this courtroom. It's in an action against the Debtor.

02:53:26 15   It's also important to look at what this

02:53:30 16   injunction has asked you to order, to prohibit Adonis from

02:53:35 17   using or disclosing the software, number one, to return

02:53:38 18   copies. There's been no allegation of improper disclosure

02:53:43 19   in this case.

02:53:43 20   We've already talked about use. Use alone is

02:53:46 21   not infringement. There's no basis to demand return because

02:53:50 22   simply possessing it is not infringement.

02:53:52 23   I'd like to start -- I'm happy to start where

02:53:57 24   you want me to start. Where I'd like to start is

02:54:00 25   irreparable harm and a balancing of the equities.

02:54:04 1   Belvac must prove, independent from the

02:54:07 2   likelihood of success on the merits, that it's

02:54:10 3   experiencing -- is experiencing irreparable injury, that it

02:54:14 4   will suffer irreparable harm that Your Honor noted is

02:54:16 5   causally connected, causally attributed to the challenged

02:54:22 6   infringement, not that it's likely to suffer.

02:54:24 7   So all of the statements of if this happens,

02:54:27 8   this could happen aren't relevant. There has to be a clear

02:54:33 9   showing of actual harm. Irreparable harm is not presumed.

02:54:39 10   It's critical to keep in mind again: What are

02:54:42 11   the acts of accused infringement? What does the irreparable

02:54:45 12   harm have to be from?

02:54:47 13   The allegations are turning the machines on and

02:54:49 14   off and plugging in an external device. There is no causal

02:54:55 15   connection to any harm stemming from use alone, and that's

02:54:59 16   where I think primarily most of the arguments are coming

02:55:02 17   from.

02:55:03 18   There's no argument that when you turn it on and

02:55:06 19   off, there is then a safety issue. When you plug in an

02:55:11 20   external device to change the settings, then there is a

02:55:15 21   quality issue. There's none of that linkage and that's

02:55:18 22   critical.

02:55:19 23   As I had said before, the parties don't compete.

02:55:24 24   This is a vendor-customer relationship. It's a

02:55:29 25   fundamentally different issue when it comes to irreparable

02:55:31 1   harm. Adonis isn't cutting into their market. We're

02:55:35 2   privately using the software on the equipment that nobody

02:55:37 3   disputes we own. Allowing Adonis to continue is preserving

02:55:42 4   the status quo.

02:55:43 5   All of Belvac's arguments are in the framework

02:55:47 6   of, If this, then this could happen. I find it telling that

02:55:53 7   bankruptcy was finalized, I believe, on February 7th. That

02:55:56 8   was over ten weeks ago. There have been no examples of the

02:56:00 9   irreparable harm happening. No other customers mentioning

02:56:05 10 the lawsuit, thinking that the reputation has gone down. No

02:56:10 11 safety issues, et cetera. There is no harm that cannot be

02:56:14 12 remedied with money.

02:56:16 13   Belvac says that denying a preliminary

02:56:18 14 injunction is going to force them into -- is going to result

02:56:21 15 in a forced license. Injunctions aren't always granted

02:56:27 16 after eBay. We are not at trial. This is not a permanent

02:56:30 17 injunction request. That's not irreparable injury.

02:56:32 18   Belvac makes arguments about safety, namely

02:56:36 19 apparently Adonis' safety. If Adonis were to modify the

02:56:39 20 safety logic, Adonis could unknowingly place their personnel

02:56:42 21 at risk. That's the primary thrust of Mr. Packer's

02:56:46 22 testimony.

02:56:46 23   Yet, Belvac provides zero examples of injuries

02:56:52 24 from other customers or Vobev. There's no examples of

02:56:57 25 people who have been injured, killed, et cetera, from the

02:57:01 1   equipment. We have the declaration of Mr. Gilbert that

02:57:05 2   recognizes the safety of the equipment is very important.

02:57:09 3   The parties are on the same page as that.

02:57:10 4   There's no reason to expect that my client is

02:57:13 5   going to take any action when turning the machines on and

02:57:16 6   off or plugging in an external drive or an external device

02:57:20 7   to change settings is going to impact the safety equipment.

02:57:25 8   The next issue is diminished market share and

02:57:28 9   consumer poll. That somehow the market for their equipment

02:57:32 10   will go down at a rate that cannot be compensated

02:57:35 11   monetarily. Again, this is entirely speculative and not

02:57:39 12   specific enough to shut down a company of 415 people.

02:57:44 13   The Court asked a really good question about the

02:57:50 14   service issue and whether that was tied to the infringement.

02:57:56 15   The contract between the parties that I have seen in 2020

02:57:59 16   and 2022 doesn't have a service component that's required.

02:58:04 17   It's not like SaaS software where there's mandatory updates

02:58:08 18   where there are required servicings that happen. My

02:58:13 19   understanding is those are service agreements between the

02:58:16 20   parties that are separate.

02:58:20 21   THE COURT: Would it violate the license? I

02:58:23 22   understand that Adonis doesn't have a license, but would it

02:58:25 23   violate the license to have someone else service it?

02:58:33 24   MS. KLIEBENSTEIN: In 12.05 --

02:58:36 25   THE COURT: I don't want to get too far afield

02:58:38 1   again either here, but is the plant -- I mean, and maybe you

02:58:41 2   don't know. At some point the machines are going to need to

02:58:44 3   be repaired.

02:58:45 4   Have you-all thought about mediating this case

02:58:48 5   or has that been done?

02:58:50 6   MS. KLIEBENSTEIN: That's a very good question,

02:58:53 7   Your Honor. I'm trying to get through today.

02:58:55 8   THE COURT: Okay.

02:58:56 9   MS. KLIEBENSTEIN: So, you know, that's a

02:58:59 10   conversation for tomorrow.

02:59:02 11   THE COURT: Okay.

02:59:02 12   MS. KLIEBENSTEIN: Certainly. I was -- I'm a

02:59:05 13   newcomer.

02:59:06 14   THE COURT: Understood.

02:59:08 15   MS. KLIEBENSTEIN: I wasn't a participant in the

02:59:10 16   bankruptcy proceedings.

02:59:11 17   THE COURT: Right. Maybe that was an unfair

02:59:13 18   question, but I do sort of see all of the things happening

02:59:15 19   now are sort of ways to get leverage. At some point you-all

02:59:18 20   are going to have to come to terms and work this out.

02:59:21 21   I'm happy to do my role in this, which is decide

02:59:23 22   the preliminary injunction in the copyright case, but it

02:59:28 23   does seem like maybe the folks ought to sit down and talk to

02:59:31 24   each other. But that's a comment. If you don't -- if

02:59:33 25   you're not able to respond, that's fine.

02:59:35 1   MS. KLIEBENSTEIN: I appreciate that comment.

02:59:37 2   There are a lot of moving parts at the current moment, but

02:59:41 3   appreciated.

02:59:42 4   THE COURT: Literally moving parts within a

02:59:45 5   machine, right.

02:59:45 6   MS. KLIEBENSTEIN: I would take you to 14.04

02:59:52 7   which, you know, there's actually a lot of interesting parts

02:59:54 8   of this contract, which is all to say specific conclusions

03:00:03 9   on a preliminary injunction hearing, I believe, are

03:00:05 10   difficult to make.

03:00:07 11   When you look at 14.04 "Consequences of

03:00:13 12   Termination," Section A(ii) allows the owner -- and the

03:00:16 13   owner, mind you, is Vobev. Vobev is titled as the owner --

03:00:21 14   "allowed to finish the work by whatever method the owner may

03:00:24 15   deem expedient at his expense."

03:00:25 16   So that to me says that there is not a hook, as

03:00:28 17   there is in some contracts, to always consistently use

03:00:33 18   Belvac.

03:00:33 19   THE COURT: Understood.

03:00:36 20   MS. KLIEBENSTEIN: Moving on to balancing of the

03:00:43 21   equities very briefly. Everybody agrees that if the -- if

03:00:48 22   there is an injunction, the machines are worthless.

03:00:51 23   Millions -- tens of millions of dollars of machines would be

03:00:55 24   worthless. No cans could be made. Adonis' entire business

03:00:58 25   would need to be shut down because that's 100 percent of

03:01:01 1   their revenue stream.

03:01:03 2   Adonis would have three choices. Buy new

03:01:06 3   equipment, write new code or go bankrupt.

03:01:10 4   Buying new equipment is a tens of millions of

03:01:12 5   dollars proposition, and it would take months to get that up

03:01:15 6   and running. You've heard how big some of the machines are.

03:01:18 7   They're very complex.

03:01:19 8   Writing new code, Belvac said itself in

03:01:24 9   Mr. Packer's original declaration, it's not aware of any

03:01:27 10   third party that could write replacement software. Writing

03:01:31 11   new code is unknown at this time, and whether it takes eight

03:01:34 12   weeks or eight months, that's still too long for my client

03:01:37 13   to be out of business.

03:01:38 14   So if an injunction is granted, it's

03:01:42 15   option three for us. And 415 people will be out of a job

03:01:47 16   should this injunction issue.

03:01:48 17   I would suggest -- well, I don't suggest -- if

03:01:53 18   you're weighing the equities and the harm to Belvac on this

03:01:57 19   end, it would appear to me that the harm to Adonis is clear,

03:02:03 20   and concrete and immediate. And it's going to be

03:02:05 21   significant.

03:02:08 22   Moving on to the legal merits. Again, it

03:02:14 23   appears uncontested or at least conceded that it's at the

03:02:20 24   very least a tossup that unlicensed use alone does not

03:02:24 25   violate the Copyright Act. I don't believe it's a tossup.

03:02:28   1   I believe it's crystal clear.

03:02:30   2   There are cases, of course, that have the

03:02:32   3   sentence, This use is unlicensed; therefore, it's copyright

03:02:35   4   infringement. However, if you typically read one, two

03:02:38   5   paragraphs down, it will say, because they did this or they

03:02:41   6   did that. It will articulate actions that would fall under

03:02:47   7   Section 106 of the Copyright Act. Use alone is not enough.

03:02:50   8   In reply, a note about -- a note about the

03:02:59   9   waiver argument. So we've been responding to what's been

03:03:04 10   presented to us. In the opening brief of the preliminary

03:03:08 11   injunction, it was all about use. The Complaint is all

03:03:10 12   about use. We responded to use. In the reply, we got

03:03:15 13   something else.

03:03:16 14   Then we asked Your Honor for permission for a

03:03:20 15   sur-reply, knowing that those are very disfavored. We chose

03:03:23 16   to make that a very short sur-reply so that we would get

03:03:26 17   your permission. There was very little space to articulate

03:03:29 18   all there is to say about fair use and all there is to say

03:03:32 19   about essential step.

03:03:34 20   I don't believe that's waiver. I believe that's

03:03:36 21   a proper and appropriate response to what was in the reply.

03:03:41 22   Maybe a better position is that what was put in the reply is

03:03:44 23   waived. New subject matter outside the scope of the

03:03:46 24   Complaint, and we shouldn't have had to respond to it at

03:03:49 25   all.

03:03:49 1   They should be stuck with use alone, and now

03:03:52 2   we'd all agree that use alone does not violate Section 106

03:03:56 3   of the Copyright Act.

03:03:57 4   On fixation, the duration of fixation, the case

03:04:12 5   law, in my opinion, is not so clear. In *CDK*, the Ninth

03:04:17 6   Circuit noted that the *MAI* decision did not rule, as a

03:04:21 7   matter of law, that putting it into ram equals copying for a

03:04:26 8   fixed duration of a long enough period.

03:04:30 9   I believe that that issue is ripe for expert

03:04:33 10   testimony on how exactly computers run and whether something

03:04:37 11   is transitory or not.

03:04:40 12   Moving on to the essential step. Moving on to

03:04:49 13   the essential step, I want to pause for a minute and address

03:04:53 14   Your Honor's questions about how I perceive the bankruptcy

03:04:56 15   proceedings as someone who's coming in kind of in your shoes

03:05:01 16   and reacting to what I'm reading.

03:05:03 17   My impression of transcripts is that they are a

03:05:08 18   sum of words. They are also a sum of body language and

03:05:11 19   verbal cues. And they're also a sum of the posture of the

03:05:15 20   problem as it's come up through.

03:05:19 21   And opposing counsel said that that section of

03:05:23 22   the transcript and what the Judge was talking about is the

03:05:28 23   first-sale doctrine.

03:05:28 24   THE COURT: Well, that was because the

03:05:30 25   distribution in the bankruptcy case was the distribution

03:05:34 1   from the Debtor to your client. And so the first-sale

03:05:40 2   doctrine talks about whether or not that's a copyright

03:05:42 3   infringement on the part of the Debtor. But your client's

03:05:44 4   not distributing to anyone at this point.

03:05:47 5   So the first-sale doctrine doesn't really come

03:05:49 6   up here; right? Am I missing something?

03:05:51 7   MS. KLIEBENSTEIN: No, Your Honor, you're not.

03:05:52 8   THE COURT: Okay.

03:05:53 9   MS. KLIEBENSTEIN: But I think it is actually a

03:05:54 10   critical point --

03:05:55 11   THE COURT: Okay.

03:05:55 12   MS. KLIEBENSTEIN: -- because under the first --

03:05:57 13   copyright is -- copyright law is very complicated. I am

03:06:01 14   lucky to do it all day every day. And sometimes the same

03:06:05 15   word has different definitions determined by what you're

03:06:08 16   talking about.

03:06:10 17   Ownership for the first-sale doctrine, what I

03:06:13 18   tell people is, you know, it's capital O ownership. It's

03:06:16 19   like you own the thing. It is yours exclusively. You own

03:06:20 20   all the bundles of rights and all the sticks.

03:06:23 21   When it comes to essential step, it is not the

03:06:26 22   same thing. And that's borne out by the case law. The case

03:06:29 23   law that discusses it refers to incidents of ownership.

03:06:33 24   That's not the same as the capital O ownership that's

03:06:36 25   required under the first-sale doctrine, if that makes sense.

03:06:39 1   THE COURT: Sure.

03:06:40 2   MS. KLIEBENSTEIN: And so it's very important

03:06:42 3   that the bankruptcy Judge was being premised with we're

03:06:46 4   talking about fair use capital O ownership what's going --

03:06:50 5   THE COURT: Ownership of the intellectual

03:06:52 6   property rights. Is that what you call capital O ownership?

03:06:54 7   MS. KLIEBENSTEIN: No. Well, there's that, too.

03:06:57 8   I mean, you were asking questions about the

03:06:59 9   actual software that's in the machine, not incidents of

03:07:03 10   ownership, capital O ownership, which are two different

03:07:06 11   things.

03:07:07 12   And when I read the transcript, how I read the

03:07:16 13   Order is it's not inconsistent with the transcript. It's

03:07:21 14   fulsome. It's telling us what the Judge was talking about.

03:07:25 15   And when you go to the Order, Footnote 5, the

03:07:28 16   purchased -- I'll wait for you. I apologize.

03:07:33 17   THE COURT: Yeah. Stand by. You already handed

03:07:39 18   it to me, didn't you?

03:07:42 19   THE CLERK: It's Exhibit M.

03:07:47 20   THE COURT: Footnote 5, got it.

03:07:48 21   MS. KLIEBENSTEIN: And this is in response to

03:07:49 22   your question about: How do I connect the preliminary

03:07:51 23   ruling to the Order? And Footnote 5, the purchaser has

03:07:58 24   agreed that the purchased assets shall not include any

03:08:01 25   transfer of intellectual property rights owned by Belvac.

03:08:04 1   That's one point of color.

03:08:06 2   Then you move back to Page 17, Paragraph KK.

03:08:18 3   The Sale Order does not authorize the purchaser to purchase

03:08:21 4   or license any intellectual property rights.

03:08:27 5   I'll move on when you're ready.

03:08:44 6   And then in Paragraph 52, there's a full

03:08:48 7   preservation of intellectual property rights.

03:08:59 8   THE COURT: So where does the Bankruptcy Court

03:09:01 9   deal with your opponent's argument that it was a copyright

03:09:09 10   infringement to approve the Sale Order, because the machines

03:09:15 11   had a copy of the software on them and that transfer of the

03:09:21 12   machines was a distribution of the software?

03:09:24 13   He made the preliminary finding that your client

03:09:29 14   or that the Debtor didn't own the software. That seemed to

03:09:34 15   me to be clear.

03:09:35 16   Was there -- I'm trying to understand what

03:09:39 17   exactly happened here, and that maybe you-all will argue

03:09:42 18   about that in front of the District Court in Utah. But did

03:09:46 19   he ever order that your client lawfully has possession of

03:09:50 20   the copy of the software that's on the machines?

03:09:52 21   MS. KLIEBENSTEIN: I do not -- say that again.

03:09:57 22   THE COURT: Did he ever order that your client

03:09:59 23   lawfully has possession or ownership of the particular copy

03:10:03 24   of the software that's on the machines?

03:10:05 25   MS. KLIEBENSTEIN: My understanding is that was

03:10:07 1   not, one way or the other, addressed.

03:10:11 2   THE COURT: Right. And so I think that's where

03:10:13 3   it gets to sort of the heart of the issue is: Didn't it

03:10:16 4   need to be addressed to approve the Sale Order, because it

03:10:21 5   happened?

03:10:22 6   MS. KLIEBENSTEIN: My understanding -- well, my

03:10:24 7   understanding is that Bankruptcy Courts do not -- I don't

03:10:29 8   know if they don't like to or do not handle intellectual

03:10:33 9   property issues. My understanding is that this issue came

03:10:37 10   up on the eve of the closing of the deal, the bankruptcy,

03:10:42 11   and it came up at the hearing, along with many, many, many

03:10:45 12   other things. And this is how the Judge, I don't want to

03:10:51 13   say, kicked the can --

03:10:52 14   THE COURT: Right. Well, certainly --

03:10:54 15   MS. KLIEBENSTEIN: -- but --

03:10:54 16   THE COURT: -- I understand that everybody was

03:10:58 17   anticipating that there was going to have to be a decision

03:11:06 18   about copyright infringement between the two parties that

03:11:09 19   are before me right now. But did the -- I guess, isn't that

03:11:15 20   different from saying that the Bankruptcy Court approved a

03:11:18 21   sale that actually violated rights?

03:11:20 22   And that's why they were objecting to the sale;

03:11:22 23   right? Because transfer of the machines was in itself a

03:11:27 24   copyright infringement. And that couldn't be heard here,

03:11:29 25   because that is an infringement on the part of the Debtor,

03:11:33 1   who is not a party to this Court.

03:11:35 2   Is that not -- am I tracking?

03:11:38 3   MS. KLIEBENSTEIN: I understand your point, and

03:11:41 4   I don't -- you know, I don't want to say anything that's

03:11:44 5   going to jeopardize my client's rights in further bankruptcy

03:11:47 6   proceedings. So let me try to -- let me try to make sense

03:11:54 7   of what I know.

03:11:56 8   So it is not unusual in software copyright cases

03:12:00 9   to have an old user and a new user, both -- and this is me

03:12:06 10   stepping out of representing the Defendant -- both can be

03:12:10 11   liable for copyright infringement in -- for different

03:12:14 12   reasons. And so just because the original -- well, I

03:12:21 13   believe, frankly, the original action would be a breach of

03:12:24 14   contract against the Debtor for violating the terms of the

03:12:28 15   agreement.

03:12:29 16   From time to time in the copyright practice, you

03:12:31 17   can also have a copyright infringement objection --

03:12:33 18   THE COURT: Understood. So put in that context,

03:12:35 19   it's not unusual in a bankruptcy for machinery to get

03:12:40 20   transferred and then the new owner has to deal with the

03:12:46 21   intellectual property rights in a separate thing. But that

03:12:49 22   didn't happen here because the license was -- I don't want

03:12:54 23   to use the imprecise bankruptcy term, but it was rejected by

03:12:58 24   your client; right, in the bankruptcy? They didn't accept

03:13:00 25   the license in the bankruptcy proceeding.

03:13:04 1   And I assume, although this is not in the

03:13:06 2   record, that that was because Plaintiff was asking for all

03:13:11 3   the money they were owed. But maybe I'm wrong about that.

03:13:15 4   MS. KLIEBENSTEIN: I don't know the reasons --

03:13:17 5   THE COURT: Okay.

03:13:18 6   MS. KLIEBENSTEIN: -- but I do know that is the

03:13:20 7   conclusion of the bankruptcy proceeding is that the

03:13:22 8   underlying contracts --

03:13:23 9   THE COURT: Right.

03:13:23 10   MS. KLIEBENSTEIN: -- did not go along to

03:13:25 11   Adonis.

03:13:25 12   THE COURT: Okay.

03:13:26 13   MS. KLIEBENSTEIN: If that makes sense.

03:13:28 14   THE COURT: Yes.

03:13:29 15   MS. KLIEBENSTEIN: So moving into the essential

03:13:38 16   step, I think we all agree on what is the test. It appears

03:13:41 17   that the second and third elements of the essential step

03:13:43 18   test, namely that the copy isn't used in any other manner

03:13:47 19   and that the new copy is created as an essential step of

03:13:50 20   using the software with the equipment, those appear to be

03:13:53 21   agreed upon by the parties. Rather, it's the first that the

03:13:56 22   user is an owner of a copy of the software installed in the

03:14:01 23   equipment is where the dispute is.

03:14:04 24   The test is whether Adonis has incidents of

03:14:07 25   ownership to use the software internally privately. Not do

03:14:12 1   we own title, not do we own for all uses. And it's a

03:14:16 2   fact-bound inquiry.

03:14:17 3   The question of incidents of ownership is

03:14:22 4   basically -- is do we have incidents of ownership that would

03:14:25 5   allow us to turn the machines on or off or to hook up an

03:14:29 6   external device to make modifications to the settings. The

03:14:33 7   facts show that it does.

03:14:36 8   With regard to the original equipment, there's

03:14:39 9   no dispute that it was on the equipment. It was used to run

03:14:43 10   the equipment. And the machines were owned. There's no

03:14:47 11   kill switch on this software.

03:14:49 12   There's no dispute, as we heard with Mr. Packer,

03:14:52 13   that a lot of money was paid for this customized software

03:14:56 14   between the parties. Vobev is called the owner in the 2020

03:15:01 15   agreement and the 2022 agreement. And while I recognize

03:15:03 16   that those agreements don't apply to my client, it does

03:15:06 17   apply to what's on that equipment.

03:15:11 18   Under Section 12.05 of those license agreements

03:15:14 19   or those agreements, Vobev was always permitted to make

03:15:19 20   modifications, to customize the line controls, the test

03:15:23 21   screens and the safety alarms, which I find very

03:15:25 22   interesting, given the irreparable harm arguments. The

03:15:29 23   license goes past the termination of the contract. The

03:15:34 24   contract can terminate, and there's no hook to take back the

03:15:38 25   software. That's Section 14.04

03:15:43 1   I also think that Section 2.02, Title of Risk

03:15:46 2   and Loss, is interesting as well. "Title to all property

03:15:51 3   created by the work, including documents or incorporated

03:15:54 4   into the production line, shall pass to owner on the

03:15:58 5   earliest of payment delivery," et cetera.

03:16:01 6   We haven't brought up the Critical Vendor

03:16:05 7   Agreement yet, and I think that is another fact as well.

03:16:10 8   The critical vendor -- the Critical Vendor Agreement was

03:16:15 9   executed in the middle of January 2025 before the dispute

03:16:21 10   was raised to the Bankruptcy Court. And what happened in

03:16:25 11   that Critical Vendor Agreement is that we paid about

03:16:28 12 $3.8 million in exchange for a promise that Belvac would

03:16:33 13   continue to supply goods and services to Adonis based on the

03:16:37 14   parties' working relationship. That was at least 120 days

03:16:43 15   prior to the bankruptcy petition date.

03:16:46 16   The Critical Vendor Agreement recognized that

03:16:48 17   Adonis, through the Bankruptcy Order, Adonis steps into the

03:16:53 18   shoes of Vobev for that Critical Vendor Agreement. Adonis

03:16:56 19   is Vobev and the history with Vobev has to be accounted for.

03:17:00 20   Then we have to look at, Okay, when the Critical

03:17:03 21   Vendor Agreement mentions trade terms, what do we know about

03:17:05 22   those trades terms? Well, they're set forth at least in the

03:17:09 23   2020 and 2022 agreements. They outline that the software

03:17:14 24   can be used, that services will be provided.

03:17:18 25   I think the fact that it was called a license

03:17:20 1   from the start is really confusing ownership of the

03:17:24 2   copyright with incidents of ownership of the copy. And when

03:17:29 3   you back up to the 10,000-foot level, it doesn't make sense

03:17:32 4   that Adonis could lawfully use the software, the machines,

03:17:37 5   but couldn't fix it when it develops a bug and couldn't turn

03:17:40 6   it on again if the power goes out. That doesn't make any

03:17:44 7   sense. And that's what the essential step doctrine was made

03:17:47 8   for.

03:17:47 9   Fair use. As we heard about from Mr. Packer,

03:18:00 10   transformation does occur when it goes from nonvolatile

03:18:05 11   memory, an SD card or a flash drive over to ram. What we

03:18:10 12   heard Mr. Packer agree to is that the copy on the SD card is

03:18:13 13   for storage and the copy on ram is for executing. They're

03:18:17 14   different uses. The software doesn't run from the SD card.

03:18:21 15   It can only run from the ram.

03:18:23 16   The copy on the external device is for editing.

03:18:26 17   These are transformative uses.

03:18:30 18   The nature of the work, Mr. Packer agreed, is

03:18:34 19   primarily functional. The effect on the market is zero.

03:18:39 20   We're not selling the software to somebody else. We're not

03:18:42 21   cutting in on their market.

03:18:49 22   I'd like to make a note about the bond. My

03:18:58 23   understanding of a bond requirement is that it's not from

03:19:00 24   the perspective of: What does the Plaintiff think it should

03:19:05 25   pay, but what is the harm to the Defendant? We've asked for

03:19:10 1 $50 million with $400,000 increasing day by day during the

03:19:15 2   injunction because this injunction would entirely put us out

03:19:18 3   of business. A bond for 13 million that's somehow tied of

03:19:23 4   what was owed under the pre-petition contracts, it's like

03:19:26 5   apples and oranges to what the purpose of the bond is set

03:19:31 6   out to be.

03:19:32 7   And, Your Honor, I don't think I have any other

03:19:37 8   comments, unless you have further questions.

03:19:39 9   THE COURT: No, I don't. Thank you very much.

03:19:44 10   MR. FINKELSON: May I proceed, Your Honor?

03:19:47 11   THE COURT: Yes.

03:19:48 12   MR. FINKELSON: With respect to the bond, Your

03:19:54 13   Honor, our position, I think, is well articulated in the

03:19:58 14   briefs. There's no question to anybody what Adonis would

03:20:02 15   have needed to do to avoid being in this situation that we

03:20:06 16   are all now in today. It was clear in the Bankruptcy Court.

03:20:11 17   It's clear from Your Honor's admonitions to both parties

03:20:14 18   with respect to what's been the history of negotiation here.

03:20:17 19   But all Adonis had to do was to assume the

03:20:22 20   contracts that Vobev had. That would have given them a

03:20:27 21   license. We wouldn't be talking about copyright

03:20:30 22   infringement.

03:20:30 23   Why didn't Adonis do that? It did that because

03:20:33 24   it didn't want to pay $13 million and now comes in and asks

03:20:38 25   for a bond of $196 million, assuming in a very friendly way,

03:20:46 1   that this case only takes a year to get to trial.

03:20:48 2   THE COURT: Can I ask you, given that you've had

03:20:52 3   a longer history on the case, have the parties sat down and

03:20:56 4   tried to work this out?

03:20:57 5   MR. FINKELSON: The parties have not had a

03:20:59 6   formal mediation, but the parties have had informal

03:21:03 7   discussions, both through counsel and directly business to

03:21:06 8   business, in hopes of resolving this and have not been able

03:21:11 9   to make progress to this point. But often when someone in

03:21:15 10   Your Honor's position says that out loud to the parties,

03:21:19 11   sometimes that helps.

03:21:20 12   And we have representatives from both the

03:21:22 13   parties here. Mr. Packer not as senior in the organization

03:21:26 14   as Adonis' corporate representative. But we're mindful of

03:21:30 15   Your Honor's comments, and I genuinely would like to find a

03:21:35 16   pathway to resolve this.

03:21:37 17   THE COURT: I take it from your factual

03:21:39 18   presentation that it is your view, as a matter of fact, that

03:21:43 19   at some point, the machine is going to need to be repaired

03:21:47 20   and that they are going to need your help.

03:21:51 21   Is that the case? I mean, I see that --

03:21:54 22   MR. FINKELSON: Yes.

03:21:54 23   THE COURT: -- this is going to end up at one

03:21:56 24   place and so why not -- why shouldn't both sides spend their

03:22:04 25   time and money getting it resolved rather than litigating

03:22:07 1   it, if there's only one station where this train is going to

03:22:13 2   end up?

03:22:15 3   MR. FINKELSON: Understood, Your Honor. And,

03:22:16 4   again, I think that the parties have attempted to have

03:22:21 5   discussions. None of the counsel at the table for Adonis

03:22:25 6   has been involved. It's been one of counsel of the table's

03:22:28 7   counsel, Mr. Daigle, who's been involved. He's acted in

03:22:32 8   good faith. They've been good faith discussions.

03:22:35 9   Adonis personnel has been on that call. I think

03:22:38 10   they've acted in good faith in those discussions. Our

03:22:42 11   client has acted in good faith, and so far we haven't made

03:22:45 12   progress.

03:22:45 13   And often, as is the circumstance here, the

03:22:48 14   parties sometimes need a nudge by a Court deciding the

03:22:53 15   issues that are presented before the Court at the time. And

03:22:59 16   they often go into it assuming the nudge is going to be that

03:23:03 17   of the other party and ends up being them. And it certainly

03:23:06 18   could be either here.

03:23:07 19   And -- but we'd like to find a pathway to

03:23:11 20   resolve this, short of litigating this case. And -- but we

03:23:16 21   haven't been able to do that so far.

03:23:18 22   So our proposal on the bond is tethered to

03:23:21 23   business realities. It's also tethered, even if you take

03:23:23 24   the $400,000 a day which bears no relationship to any facts

03:23:29 25   in this case, just pulled from another case, I think. Even

03:23:31 1   if you take that and a reasonable assessment of how long it

03:23:34 2   would take for Adonis to create brand new code from scratch,

03:23:39 3   weeks not months, it comes out to a very similar number in

03:23:43 4   that kind of 12-to-$13-million range. We think that's

03:23:47 5   appropriate here, given the facts and given the

03:23:50 6   circumstances.

03:23:50 7   The comments about the CV agreement have no

03:23:56 8   bearing on the issues before this Court. The CV agreement

03:24:01 9   is a forward-looking agreement that deals with

03:24:05 10   forward-looking issues. The parties have some disputes

03:24:08 11   about the terms.

03:24:09 12   One thing we don't have any dispute about is

03:24:13 13   what the trade terms are and that those trade terms have

03:24:19 14   nothing to do with what's in the prior Vobev-Belvac

03:24:24 15   agreements. And the reason we don't have a disagreement is

03:24:26 16   because they went into the Bankruptcy Court to get the neck

03:24:31 17   reports delivered over our objection and said, Any of those

03:24:34 18   terms and conditions that used to exist as to Vobev, they

03:24:37 19   don't exist to us, Adonis.

03:24:39 20   And we said, Well, we should have some terms and

03:24:42 21   conditions. These are at least a reference point. And the

03:24:46 22   Judge accepted Adonis' argument and didn't impose any of

03:24:51 23   those terms and conditions.

03:24:52 24   So the CV agreement may present issues for Your

03:24:54 25   Honor to deal with down the line. It doesn't address or

03:24:57 1 deal with the issues that we're talking about here today.

03:25:00 2   I don't know the difference between big O and

03:25:03 3 little O in the context of copyright. I don't think there

03:25:10 4 is a difference between ownership for first sale purposes

03:25:15 5 and ownership for essential step purposes. If you look at

03:25:17 6 the cases, they don't treat them differently.

03:25:20 7   There is a difference between ownership being

03:25:22 8 only a title-based question and ownership being an incidence

03:25:28 9 of ownership-based investigation. And I don't disagree with

03:25:32 10 counsel for Adonis that in the essential step context, and I

03:25:36 11 think also in the first-sale context, it is looking at those

03:25:39 12 incidents of ownership. And that tells you to look at the

03:25:42 13 agreements.

03:25:43 14   There were a few sections cited today that I

03:25:45 15 hadn't heard referenced to before in any of the briefing.

03:25:49 16 12.05 speaks to all three things that matter. What's it

03:25:54 17 called and is there any ownership being granted or not in

03:25:59 18 the software, not in the IP. If the language of that

03:26:03 19 agreement was talking about IP, then I would get the

03:26:05 20 argument that that's different than ownership in the

03:26:08 21 software.

03:26:08 22   We're here to talk about ownership in the

03:26:10 23 software. And that's what 12.05 addresses directly. It

03:26:14 24 also addresses transfer. It also addresses what use can be

03:26:18 25 made, including not having a third party see or be dis --

03:26:24 1   you know, disclose the software code to a third party.

03:26:28 2   So this kind of bringing in of other provisions

03:26:31 3   that may bear on maintenance or otherwise, I don't think any

03:26:36 4   of that impacts the analysis. 12.05 is clear in what it

03:26:40 5   allows and clear in what it prohibits when it comes to use,

03:26:45 6   which is not in perpetuity upon default. They lose it.

03:26:50 7   Belvac has the right to conduct an audit to see

03:26:54 8   whether they're in breach, in which case they lose it, and

03:26:58 9   they're not allowed to transfer it to anybody. And

03:27:00 10   that's -- if you follow the thinking in the cases discussing

03:27:04 11   incidents of ownership, that's what it's about. And I would

03:27:08 12   submit to the Court that it's not a close call on ownership

03:27:13 13   versus license for essential step purposes on these facts.

03:27:16 14   Irreparable harm. There was a statement made

03:27:23 15   that the test is we must show that we are, in fact,

03:27:28 16   suffering irreparable harm. That's not the test.

03:27:30 17   The standard in the Third Circuit from the

03:27:34 18   *Silvertop* case uses the language that irreparable harm is

03:27:38 19   likely. It doesn't -- there is no burden for us to show

03:27:44 20   here that we are, in fact, actually suffering irreparable

03:27:48 21   harm. How could we do that when you're talking about

03:27:51 22   reputation-based injury, or goodwill-based ^ injury or loss

03:27:54 23   of control-based injury.

03:27:56 24   The test is likely to suffer irreparable harm.

03:27:59 25   And we've outlined for the Court the ways in which we are

03:28:03 1   going to suffer that irreparable harm directly tethered to

03:28:07 2   the acts of reproduction.

03:28:10 3   And then the weighing of the equities. Adonis

03:28:15 4   is here by its own choice. Adonis bought this equipment,

03:28:21 5   bought this company knowing that this issue existed. And

03:28:27 6   they may have bet on their -- on the question of whether

03:28:30 7   they were right, but when they've made that election -- when

03:28:37 8   they knew we said, You cannot do this, you're going to be

03:28:40 9   here and we're going to be alleging copyright infringement,

03:28:45 10   to use the fact that a preliminary injunction is going to

03:28:48 11   shut Adonis down as somehow favoring Adonis on the weighing

03:28:53 12   of the harms, the case law is clear. When you weigh the

03:28:58 13   harms, if it's a self-inflicted harm, it doesn't carry

03:29:02 14   weight.

03:29:02 15   There's -- there could not be a more

03:29:04 16   self-inflicted harm than this one. We screamed from the

03:29:06 17   rooftops that this was going to be a problem.

03:29:11 18   And to Your Honor's questions about the

03:29:12 19   bankruptcy proceeding, we recognized that we had a distinct

03:29:19 20   claim, both for copyright infringement and breach of

03:29:22 21   contract, against the Debtor. And, in our view, also had a

03:29:26 22   copyright infringement claim against Adonis once we got

03:29:30 23   here.

03:29:32 24   I don't think the Court, ultimately, tangled

03:29:35 25   with the issue in response to your direct question that,

03:29:38 1   yes, I don't think the Court ultimately tangled with the

03:29:41 2   issue. Adonis basically said to the Court, That can be

03:29:44 3   dealt with in this proceeding in Delaware, when the "it" is

03:29:50 4   really not one in the same as the "it" as we're dealing with

03:29:53 5   here. So that's, I think, my best answer to your question

03:29:56 6   on what is admittedly not the most crystal clear --

03:30:00 7   THE COURT: I appreciate that.

03:30:01 8   MR. FINKELSON: -- of records on that point.

03:30:02 9   And, lastly, just so we're clear, because we

03:30:04 10   have talked all about reproduction here today. And -- but

03:30:07 11   to be clear, it remains our position, in the alternative,

03:30:12 12   that the post-license commercial exploitation of our

03:30:17 13   software by Adonis through use of that software alone is, in

03:30:25 14   fact, inconsistent with our exclusive rights under the

03:30:30 15   Copyright Act.

03:30:30 16   THE COURT: Which one? Which exclusive right?

03:30:31 17   MR. FINKELSON: It remains our position -- it's

03:30:34 18   inconsistent with the -- both the reproductive -- right of

03:30:37 19   reproduction and the right of distribution, because part and

03:30:41 20   parcel of having a software license program, right, is that

03:30:46 21   you're using that license program to control those things.

03:30:52 22   And that's what the Clinical In -- there's only

03:30:55 23   one case cited by the parties on this use issue as fairly

03:31:00 24   presented by our position on it. That's the *Clinical*

03:31:04 25   *Insights* case. I think it's from the Western District of

03:31:06 1   New York. I always get -- I get --

03:31:08 2   THE COURT: Well, let's just get into this. I

03:31:11 3   just want to make sure we're very clear, because I think we

03:31:14 4   were productively talking about copies made incident to

03:31:19 5   running the software. But the rights in 17 U.S. Code 106,

03:31:26 6   Number 1 is the right to reproduce the copyrighted work.

03:31:30 7   So aside from the copy made in the ram, or on

03:31:33 8   the laptop or the ram of the laptop, how is use reproducing

03:31:38 9   the copyrighted work? We can go through this. Maybe it's

03:31:41 10 not productive right now.

03:31:43 11   MR. FINKELSON: Yes. And I'm happy to go

03:31:45 12 through it if Your Honor would like to. I focused on the

03:31:49 13 kind --

03:31:49 14   THE COURT: The copying.

03:31:50 15   MR. FINKELSON: The copying --

03:31:51 16   THE COURT: Right.

03:31:52 17   MR. FINKELSON: -- which is clearer. I just

03:31:54 18 want to make clear for the record, because this case is

03:31:55 19 going to proceed in some form, that we will continue to

03:32:00 20 assert --

03:32:01 21   THE COURT: You haven't dropped the argument?

03:32:03 22   MR. FINKELSON: We haven't dropped the argument,

03:32:05 23 but our position is in a situation -- the test is

03:32:08 24 inconsistency with one of the exclusive rights. That's the

03:32:11 25 test. If you look at the *Teleprompter* case, that's from the

03:32:14 1   Supreme Court. That's how it's phrased.

03:32:16 2   And it is our position, and we believe *Clinical

03:32:19 3   Insights* supports this, that when you have a post-license

03:32:24 4   software use, here strategically and on purpose, that that

03:32:32 5   continued use alone, even if there was no actual

03:32:35 6   reproduction, that that is inconsistent with our right, both

03:32:39 7   to do and to authorize -- both of which are spelled out in

03:32:45 8   Section 106 -- to do and to authorize reproduction and

03:32:50 9   distribution.

03:32:51 10   That's our position, and we think *Clinical

03:32:54 11   Insights* supports it. We don't think any of -- we're not

03:32:56 12   arguing for a new rule that uses an exclusive right. We're

03:33:00 13   not arguing for any of that stuff.

03:33:02 14   But we do believe there's a nuanced question

03:33:04 15   here that we would like to tease out with the Court if this

03:33:10 16   matter proceeds, if we're allowed to, on that question. But

03:33:12 17   it is not a question that's necessary to be decided for

03:33:15 18   purposes of granting us a preliminary injunction based on

03:33:18 19   reproduction.

03:33:19 20   And the scope of that injunction can be tailored

03:33:23 21   to that fact as well as the Court sees fit. We framed it in

03:33:28 22   terms of use because use imminently and invariably is going

03:33:31 23   to involve reproduction, right. But you could frame it in

03:33:35 24   terms of reproduction, and that would also speak to the

03:33:42 25   issues before the Court.

03:33:43 1   So I just want to make clear we're not

03:33:45 2   jettisoning the argument. I didn't devote much time to it

03:33:48 3   today because I think it is hotly debated, but we believe

03:33:52 4   that there is room for that argument, even in the absence of

03:33:57 5   actual reproduction. But it's not necessary to reach that

03:34:00 6   or decide that for purposes of ruling on the preliminary

03:34:03 7   injunction.

03:34:03 8   THE COURT: Well, it might be to rule on the

03:34:04 9   motion to dismiss, but you said that you'd be happy, too, if

03:34:11 10 I granted leave to amend.

03:34:13 11   MR. FINKELSON: Yes. And I was actually going

03:34:14 12 to ask you that question. So if you grant us leave to

03:34:17 13 amend, what we would propose to do in that amendment are two

03:34:21 14 things.

03:34:21 15   One, to spell out the reproduction -- acts of

03:34:25 16 reproduction facts as have been played out in the

03:34:28 17 preliminary injunction briefing. And, also, with Your

03:34:32 18 Honor's permission, to do a better job of crystallizing this

03:34:37 19 use issue so that our position is clearer on this

03:34:41 20 alternative basis than perhaps it is on the face of the

03:34:45 21 initial Complaint.

03:34:46 22   THE COURT: Well, certainly the Court would not

03:34:47 23 require you to do anything other than provide a short and

03:34:51 24 plain statement of your entitlement to relief. So no need

03:34:54 25 to brief it in that.

03:34:57 1   And if you're saying that I don't have to decide

03:34:58 2   it, I would like to exercise that option not to decide it.

03:35:04 3   I'm suspicious of that argument, but if you amend to add the

03:35:07 4   reproduction, that certainly would state a claim. I don't

03:35:12 5   think anybody's arguing that it doesn't state a claim.

03:35:15 6   MR. FINKELSON: Right.

03:35:15 7   THE COURT: Whether or not it's a winning claim,

03:35:17 8   I don't know. But let's leave it at that.

03:35:19 9   Let me ask you one more --

03:35:20 10   MR. FINKELSON: Please.

03:35:21 11   THE COURT: -- thing which is this: I had a

03:35:27 12   question for you earlier about irreparable harm, and I asked

03:35:32 13   you how it was tied to the reproduction. And you had an

03:35:36 14   answer for it, which is that they could make modifications,

03:35:42 15   and that those modifications would necessarily make a copy

03:35:46 16   of the software and that those could have safety issues.

03:35:48 17   But under the original license, the licensee,

03:35:58 18   Vobev, they had a right to make modifications consistent

03:36:01 19   with what, adopting the software; right?

03:36:05 20   MR. FINKELSON: They had a right in

03:36:06 21   Section 12.05 to make certain specifically enumerated

03:36:09 22   modifications.

03:36:10 23   THE COURT: Right.

03:36:11 24   MR. FINKELSON: Counsel made the point that one

03:36:12 25   of them was safety alarms. Safety alarms is not safety

03:36:15 1   sensors and all the equipment that's kind of ensuring

03:36:19 2   safety. It's whether Your Honor wants a red light or a

03:36:23 3   screaming red light popping up on her screen when there is a

03:36:26 4   safety event. So an alarm -- the ability to modify with

03:36:30 5   respect to a safety alarm is very different than the ability

03:36:33 6   to modify how the code is actually performing the safety

03:36:38 7   functions, if that makes sense.

03:36:39 8   So that's -- but there is no question they had a

03:36:41 9   right to make certain modifications. That right, however,

03:36:45 10   was subject to both a contractual provision and a practical

03:36:49 11   reality, neither of which exist here.

03:36:52 12   The contractual provision was, We have the right

03:36:53 13   to audit, right, to come in and audit any modifications. We

03:36:57 14   don't have that right with Adonis, because they're not

03:36:59 15   subject to a contract any -- they've rejected the license.

03:37:04 16   The practical reality, and I think maybe this is

03:37:07 17   where Your Honor picked up on some of Mr. Packer's

03:37:09 18   testimony, the practical reality is with all of our

03:37:12 19   licensees, we're in their places of business all of the

03:37:16 20   time, right. Why are we in there? We're by virtue -- in

03:37:20 21   there by virtue of them being authorized licensees of ours.

03:37:24 22   So I do think the question of servicing is --

03:37:30 23   points in our favor as opposed to against us, because here

03:37:33 24   we have a situation where a party has decided to forego all

03:37:38 25   of that. They're going to go it on their own. They just

03:37:41 1   want to run the machines. They're not bound by any

03:37:44 2   contractual provisions of a licensee to have any

03:37:47 3   modifications. They may be limited to only a subclass as

03:37:51 4   was set forth in the contract. They're not subject to audit

03:37:55 5   rights. We're not in their facility because they're going

03:37:58 6   their own.

03:37:59 7   So all of the protections that exist in a

03:38:01 8   licensee scenario are gone. Are gone. And that's where the

03:38:08 9   lack of control over the software very much is tied to the

03:38:13 10   harms that we have enumerated and that we believe are

03:38:19 11   irreparable and support injunctive relief.

03:38:21 12   Does that answer Your Honor's question?

03:38:22 13   THE COURT: It does. All right.

03:38:25 14   MR. FINKELSON: Unless you have any other

03:38:26 15   questions, Your Honor.

03:38:26 16   THE COURT: I don't, and you're about out of

03:38:29 17   time any way. So --

03:38:29 18   MR. FINKELSON: I was keeping track. Thank you

03:38:31 19   for your time and patience.

03:38:32 20   THE COURT: Okay. So it's about 3:38 right now.

03:38:37 21   We spent a lot of time before the hearing today looking at

03:38:43 22   the record. I think we have a good understanding of what's

03:38:46 23   going on here. We certainly did before we came in, but even

03:38:49 24   a better one now after hearing from counsel.

03:38:52 25   And by the way, the skill and knowledge of

03:38:56 1   counsel on both sides was just excellent. I can't remember

03:39:01 2   having a hearing in recent memory that's been so well

03:39:05 3   presented on both sides, and I really do appreciate it.

03:39:08 4   I'd like to take a recess. I think I'm going to

03:39:11 5   be in a position to give you at least a preliminary answer

03:39:16 6   today on the question of preliminary injunction.

03:39:20 7   So let's take a break for half an hour. I don't

03:39:25 8   know if folks have got plane flights or anything that

03:39:28 9   they're trying to get to, but I promise to be quick when I

03:39:31 10   come back.

03:39:31 11   Would that pose a problem for anyone returning

03:39:35 12   at 4:10?

03:39:37 13   MR. FINKELSON: Not for us, Your Honor.

03:39:38 14   MS. KLIEBENSTEIN: I don't think so.

03:39:39 15   THE COURT: As long as I have one counsel from

03:39:41 16   each side to be present in the courtroom when I state the

03:39:43 17   ruling so that we're not conducting an ex parte proceeding,

03:39:47 18   that's fine. If Delaware counsel have other obligations,

03:39:50 19   you're definitely excused. So we'll see you back in half an

03:39:56 20   hour.

03:39:56 21   DEPUTY CLERK: All rise.

03:42:20 22   (Recess was taken.)

04:22:35 23   DEPUTY CLERK: All rise.

04:22:36 24   THE COURT: Please be seated. Thank you for

04:22:37 25   your patience.

04:22:52 1   All right. I'm ready to rule on the motion for

04:22:55 2   a preliminary injunction. The motion for a preliminary

04:22:57 3   injunction is going to be denied.

04:22:59 4   Both sides agree on the elements required to

04:23:03 5   obtain a preliminary injunction. That is, the Plaintiff

04:23:05 6   must establish likelihood of success on the merits that the

04:23:10 7   Plaintiff is likely to suffer irreparable harm in the

04:23:13 8   absence of preliminary relief, that the balance of equities

04:23:16 9   tips in the Plaintiff's favor, and that an injunction is in

04:23:19 10   the public interest. We all agree on those elements.

04:23:24 11   The failure to establish any element renders a

04:23:27 12   preliminary injunction inappropriate. And I find on this

04:23:28 13   record that Belvac has failed to establish the element of

04:23:32 14   irreparable harm, which precludes the Court from entering a

04:23:36 15   preliminary injunction.

04:23:37 16   Belvac contended in its papers and argued before

04:23:42 17   the Court today a number of bases in support of a finding of

04:23:47 18   irreparable harm. It argued that denying a preliminary

04:23:51 19   injunction here would amount to a forced license to Belvac's

04:23:54 20   creative work. Whatever force that argument has in other

04:23:58 21   contexts and circumstances, it doesn't have force here.

04:24:03 22   We are talking about software that runs canning

04:24:07 23   machines. I have no doubt that developing the software

04:24:10 24   required significant monetary investment and creativity, but

04:24:14 25   the fact remains that Belvac routinely licenses its software

04:24:18 1   to its customers. Under the circumstances here, I cannot

04:24:21 2   find that damages would be inadequate to compensate Belvac

04:24:25 3   for the use of its work.

04:24:27 4   For the same reason, I reject Belvac's argument

04:24:29 5   that damages for infringement are hard to quantify and that

04:24:32 6   there's no adequate remedy of law. Belvac and Adonis don't

04:24:38 7   compete. Belvac regularly licenses its software. And the

04:24:41 8   record reflects that the value attributable to Adonis' use

04:24:45 9   of the software can be quantified and surely can be

04:24:51 10   calculated at trial.

04:24:52 11   Belvac also argues and we focused on this at the

04:24:56 12   oral argument today that Adonis use of the software without

04:24:59 13   Belvac's oversight might injure Belvac's reputation in the

04:25:03 14   eyes of consumers of the cans, or in the industry or

04:25:07 15   elsewhere. The argument goes that Adonis might make a

04:25:11 16   modification of the software that jeopardizes safety or

04:25:15 17   quality, in one way or the other, and this could cause

04:25:18 18   reputational damage.

04:25:20 19   But as a legal matter, Belvac must show that the

04:25:23 20   irreparable harm is causally attributable to the challenged

04:25:27 21   infringement. That's a Third Circuit case, *TD Bank vs.*

04:25:30 22   *Hill.* It's 928 F.3d. 259 at 282.

04:25:34 23   The challenged infringement that we focused on

04:25:38 24   during the hearing today is that a copy of the software is

04:25:42 25   made in the ram of the machines when they're turned on and

04:25:46 1   in the hard drives and ram of laptops connected to the

04:25:49 2   machines. The challenged infringement doesn't cause the

04:25:52 3   alleged harm.

04:25:53 4   I appreciate the argument made by counsel for

04:25:57 5   Belvac today that if Adonis had a License Agreement with

04:26:00 6   Belvac, it would avoid the harm Belvac is talking about by

04:26:04 7   enhancing safety. For example, by giving Belvac audit

04:26:08 8   rights and other protections that would exist in a license

04:26:11 9   scenario. But those harms are not caused by the challenged

04:26:15 10   infringement itself.

04:26:15 11   So that's the Court's ruling on the motion for

04:26:21 12   preliminary injunction.

04:26:23 13   We also have a pending motion to dismiss the

04:26:28 14   Complaint. Plaintiff has indicated that it would like leave

04:26:30 15   to amend the Complaint, so leave will be granted. I'll ask

04:26:33 16   that any Amended Complaint be filed within 14 days. If the

04:26:37 17   parties stipulate to an extension, that's fine, too.

04:26:40 18   Once an Amended Complaint is granted, the Court

04:26:42 19   will dismiss the pending motion to dismiss as moot.

04:26:45 20   And then, finally, I wanted to make a pitch to

04:26:52 21   the parties to get this resolved by mediation or otherwise.

04:26:59 22   As I'm sure everyone has advised their clients, litigating a

04:27:03 23   case like this is going to be a huge investment of time and

04:27:08 24   money. We're going to need, for example, expert reports to

04:27:12 25   talk about whether a copy of the software is, in fact,

04:27:16 1   loaded onto the ram. We'll hear testimony about that.

04:27:21 2   Discovery will be incredibly expensive.

04:27:24 3   And I don't think it's going to be that much

04:27:26 4   more informative than where we are right now. We're all

04:27:31 5   going to know exactly what we know right now at the end of

04:27:33 6   it, but it's going to cost a lot of money and time. So I

04:27:36 7   would encourage both sides to think about whether this case

04:27:39 8   can be resolved without any further litigation and expense.

04:27:45 9   Does anybody else have anything they want to say

04:27:48 10   at this point before we conclude?

04:27:49 11   MR. FINKELSON: Nothing further from Plaintiff.

04:27:51 12   Thank you for your time today.

04:27:53 13   THE COURT: Thank you.

04:27:53 14   MS. KLIEBENSTEIN: Just for clarification on the

04:27:56 15   motion to dismiss, it's denied as moot with leave to refile

04:28:00 16   pending --

04:28:00 17   THE COURT: You can file another motion to

04:28:02 18   dismiss if you feel they haven't remedied the deficiencies

04:28:05 19   you pointed out --

04:28:06 20   MS. KLIEBENSTEIN: Sure.

04:28:07 21   THE COURT: -- but we're not going to deny it.

04:28:09 22   We'll give them leave to refile or give them leave to file

04:28:12 23   an Amended Complaint. And at that point, your motion will

04:28:15 24   be moot and we will dismiss it.

04:28:19 25   MS. KLIEBENSTEIN: Thank you.

04:28:19   1   THE COURT: All right. Thank you.

04:28:20   2   DEPUTY CLERK: All rise.

           3   (Court was adjourned at 4:28 p.m.)

           4   I hereby certify the foregoing is a true and

           5   accurate transcript from my stenographic notes in the

           6   proceeding.

           7   /s/ Heather M. Triozzi
                                Certified Merit and Real-Time Reporter
           8   U.S. District Court

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